



This is a digital copy of a book that was preserved for generations on library shelves before it was carefully scanned by Google as part of a project to make the world's books discoverable online.

It has survived long enough for the copyright to expire and the book to enter the public domain. A public domain book is one that was never subject to copyright or whose legal copyright term has expired. Whether a book is in the public domain may vary country to country. Public domain books are our gateways to the past, representing a wealth of history, culture and knowledge that's often difficult to discover.

Marks, notations and other marginalia present in the original volume will appear in this file - a reminder of this book's long journey from the publisher to a library and finally to you.

Usage guidelines

Google is proud to partner with libraries to digitize public domain materials and make them widely accessible. Public domain books belong to the public and we are merely their custodians. Nevertheless, this work is expensive, so in order to keep providing this resource, we have taken steps to prevent abuse by commercial parties, including placing technical restrictions on automated querying.

We also ask that you:

- + *Make non-commercial use of the files* We designed Google Book Search for use by individuals, and we request that you use these files for personal, non-commercial purposes.
- + *Refrain from automated querying* Do not send automated queries of any sort to Google's system: If you are conducting research on machine translation, optical character recognition or other areas where access to a large amount of text is helpful, please contact us. We encourage the use of public domain materials for these purposes and may be able to help.
- + *Maintain attribution* The Google "watermark" you see on each file is essential for informing people about this project and helping them find additional materials through Google Book Search. Please do not remove it.
- + *Keep it legal* Whatever your use, remember that you are responsible for ensuring that what you are doing is legal. Do not assume that just because we believe a book is in the public domain for users in the United States, that the work is also in the public domain for users in other countries. Whether a book is still in copyright varies from country to country, and we can't offer guidance on whether any specific use of any specific book is allowed. Please do not assume that a book's appearance in Google Book Search means it can be used in any manner anywhere in the world. Copyright infringement liability can be quite severe.

About Google Book Search

Google's mission is to organize the world's information and to make it universally accessible and useful. Google Book Search helps readers discover the world's books while helping authors and publishers reach new audiences. You can search through the full text of this book on the web at <http://books.google.com/>



3 2044 103 236 238

184
32

46

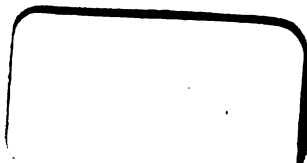
80



HARVARD LAW LIBRARY

Gift of
James Hanson Barnard
and
Augusta Barnard

RECEIVED Dec. 5, 1917



1 B.8.

27

De
PROCEEDINGS

OF

SIXTH NATIONAL CONFERENCE

AMERICAN SOCIETY FOR JUDICIAL SETTLE-
— MENT OF INTERNATIONAL DISPUTES

DECEMBER 8-9, 1916
WASHINGTON, D. C.

BALTIMORE
WILLIAMS AND WILKINS COMPANY
1917

DEC 5 1917

AMERICAN SOCIETY FOR JUDICIAL SETTLEMENT
OF INTERNATIONAL DISPUTES

1916

OFFICERS

Honorary President, WILLIAM HOWARD TAFT

President, THEODORE MARBURG, Baltimore, Md.

Vice-President, ELIHU ROOT, New York

Secretary, JAMES BROWN SCOTT, 2 Jackson Place, Washington, D. C.

Treasurer, J. G. SCHIDLAPP, Cincinnati, Ohio

EXECUTIVE COMMITTEE

THEODORE MARBURG

ELIHU ROOT

JAMES BROWN SCOTT

J. G. SCHIDLAPP

W. W. WILLOUGHBY

HENRY B. F. MACFARLAND

JAMES BROWN SCOTT, *ex-President*

JOHN HAYS HAMMOND, *ex-President*

SEMEON E. BALDWIN, *ex-President*

JOSEPH H. CHOATE, *ex-President*

CHARLES W. ELIOT, *ex-President*

Life membership, \$100; Sustaining membership, \$10 a year; Annual membership, \$1 a year. Remit to Treasurer, J. G. Schmidlapp, Cincinnati, U. S. A. Address inquiries to Tunstall Smith, Assistant Secretary, The Preston, Baltimore, U. S. A.

1917

OFFICERS

Honorary President, WILLIAM HOWARD TAFT
President, ANDREW J. MONTAGUE, Virginia
Vice-President, PHILANDER C. KNOX, Penna.
Secretary, JAMES BROWN SCOTT, 2 Jackson Place, Washington, D. C.
Treasurer, J. G. SCHMIDLAPP, Cincinnati, Ohio

EXECUTIVE COMMITTEE

ANDREW J. MONTAGUE
PHILANDER C. KNOX
JAMES BROWN SCOTT
J. G. SCHMIDLAPP
W. W. WILLOUGHBY
HENRY B. F. MACFARLAND
JAMES BROWN SCOTT, *ex-President*
JOHN HAYS HAMMOND, *ex-President*
SIMEON E. BALDWIN, *ex-President*
JOSEPH H. CHOATE, *ex-President*
CHARLES W. ELIOT, *ex-President*
THEODORE MARBURG, *ex-President*

ADVISORY COUNCIL

LYMAN ABBOTT, New York
EDWIN A. ALDERMAN, Virginia
SIMEON E. BALDWIN, Connecticut
RICHARD BARTHOLDT, Missouri
ALEXANDER GRAHAM BELL, Washington, D. C.
R. L. BORDEN, Ottawa, Ontario
THEODORE E. BURTON, Ohio
GEORGE A. CHAMBERLAIN, Oregon
WINSTON CHURCHILL, New Hampshire
GEORGE B. CUTTEN, Wolfville, N. S.
WILLIAM R. DAY, Ohio
JACOB M. DICKINSON, Tennessee

ADVISORY COUNCIL

ANDREW S. DRAPER, New York
CHARLES W. ELIOT, Massachusetts
WILLIAM DUDLEY FOULKE, Indiana
JAMES CARDINAL GIBBONS, Maryland
GEORGE GRAY, Delaware
CHARLES NOBLE GREGORY, Washington, D. C.
PETER S. GROSSCUP, Illinois
BAYARD HENRY, Pennsylvania
HARRY PRATT JUDSON, Illinois
WILLIAM H. KING, Utah
GEORGE W. KIRCHWEY, New York
PHILANDER C. KNOX, Pennsylvania
FRANCIS B. LOOMIS, Washington, D. C.
R. McBRIDE, Victoria, B. C.
PABLO MACEDO, Mexico City, Mexico
CHARLES MARCIL, Ottawa, Ontario
SIDNEY E. MEZES, Texas
S. C. MITCHELL, Delaware
JOHN BASSETT MOORE, New York
DON ROMULO S. NAON, Argentine Republic
FRANCIS G. NEWLANDS, Nevada
L. OPPENHEIM, Cambridge, England
THOMAS NELSON PAGE, Washington, D. C.
WALTER H. PAGE, New York
W. PETERSON, Montreal
SIR THOMAS RALEIGH, Oxford, England
WILLIAM RENWICK RIDDELL, Toronto, Ontario
URIAH M. ROSE, Arkansas
A. C. RUTHERFORD, Edmonton, Alberta
WALTER SCOTT, Regina, Saskatchewan
ALBERT SHAW, New York
HOKE SMITH, Georgia
GEORGE TURNER, Washington
CHARLES R. VAN HISE, Wisconsin
BENJAMIN IDE WHEELER, California
WILLIAM ALLEN WHITE, Kansas
GEORGE G. WILSON, Massachusetts
PRINCE DI CASSANO, Italy

PROGRAM

SIXTH NATIONAL CONFERENCE AMERICAN SOCIETY FOR JUDICIAL SETTLEMENT OF INTERNATIONAL DISPUTES

DECEMBER 8-9, 1916, SHOREHAM HOTEL, WASHINGTON, D. C.

Subject of the conference: THE SUPREME COURT OF THE UNITED STATES

1. What is the function of the Supreme Court in the American Government?
2. In what classes of subjects can a State sue another in the Supreme Court?
3. How does the Supreme Court decide whether a suit is between States?
4. Is the Supreme Court required to decide that a case involves law or equity before assuming jurisdiction?
5. How does the Supreme Court draw the line between justiciable and non-justiciable questions?
6. How does the Supreme Court endeavor to obtain presence of defendant State?
7. Can Supreme Court or can Government under our system compel appearance of defendant State?
8. Can plaintiff State, in absence of defendant, properly summoned, conduct case to judgment?
9. What power has Supreme Court of the United States to compel execution of judgment against a State?
10. What is the procedure of Supreme Court in actual trial of suit against State?

This topic was chosen because there have been so many allusions to the Supreme Court as a model for an International Court of Justice, the establishment of which it is the main object of this Society to promote.

FIRST SESSION

Friday, December Eighth

EIGHT O'CLOCK

THEODORE MARBURG, *Presiding Officer*

Speakers

THEODORE MARBURG
Presidential Address

PROGRAM

RALEIGH C. MINOR

Can Plaintiff State in Absence of Defendant, Properly Summoned, Conduct Case to Judgment?

ALPHEUS H. SNOW

What Power has Supreme Court of the United States to Compel Execution of Judgment Against a State?

JACKSON H. RALSTON

How Does the Supreme Court Endeavor to Obtain Presence of Defendant State?

Can Supreme Court or can Government under our System Compel Appearance of Defendant State?

JAMES BROWN SCOTT

**How Does the Supreme Court Decide Whether a Suit is Between States?
What is the Procedure of Supreme Court in Actual Trial of Suit Against State?**

SECOND SESSION

Saturday, December Ninth

TEN O'CLOCK, A.M.

JAMES BROWN SCOTT, *Presiding Officer*

Speakers

WILLIAM HOWARD TAFT

What is the Function of the Supreme Court in the American Government?

WILLIAM L. MARBURY

How Does the Supreme Court Draw the Line Between Justiciable and Non-Justiciable Questions?

WM. RENWICK RIDDELL

Another Supreme Court

WALTER S. PENFIELD

In What Classes of Subjects can a State Sue Another in the Supreme Court?

WILLIAM I. HULL

How Does the Supreme Court Endeavor to Obtain Presence of Defendant State?

PROGRAM

BANQUET

Saturday, December Ninth

SEVEN O'CLOCK, P.M.

SHOREHAM HOTEL

HENRY B. F. MACFARLAND, *Toastmaster*

Speakers

WILLIAM RENWICK RIDDELL

JOHN HAYS HAMMOND

HAMPTON L. CARSON

JAMES L. SLAYDEN

JAMES BROWN SCOTT

THEODORE MARBURG

FIRST SESSION
SIXTH NATIONAL CONFERENCE
OF THE
American Society for Judicial Settlement of
International Disputes

December 8-9, 1916

Shoreham Hotel, Washington, D. C.

FRIDAY, DECEMBER 8, 8 O'CLOCK P.M.

Mr. Theodore Marburg, Presiding Officer

ADDRESS OF THE PRESIDENT

Ladies and Gentlemen, this is the Sixth National Meeting of this body. We think that the Society has performed a service in the past and that it is continuing to perform such a service now. You may know of the volumes that we have published, how they have been sought abroad and quoted, and what tribute has been paid to us by some foreign statesmen. The distinguished Foreign Minister of The Netherlands, for example, said that we had proven the necessity and the feasibility of such a course as we are advocating.

Recent events have brought forth other societies, as the League to Enforce Peace, and there is the World's

Court League. Some suggestion has been made that these two amalgamate their effort, instead of them each having a convention; and while they would have a bigger following as a united society, the chances are that they would lose a good deal of their usefulness through uniting. When the old Southern judge had made up his mind that a negro was guilty of borrowing his neighbor's chickens, in the course of the trial he said to him, "Ephraim, what I can not understand is how you got those chickens with two fierce dogs in the yard, and a man with a loaded gun upstairs." The negro replied, "'Deed, Judge, there ain't no use of trying to tell you. You couldn't learn about it in a week of Sundays." He said, "Judge, you better continue to buy your chicken like an honest man in the market and confine your rascality to the bench, where you am at home." I believe that we had better confine our "rascality" to the special object of this great Court.

THE DEMAND FOR A TRUE INTERNATIONAL COURT

THEODORE MARBURG

This Judicial Settlement Society has but one aim—to promote the reference of justiciable disputes between the nations to a true court. Its immediate object, as a means to that end, is to secure the establishment of such a court.

Specifically the court it recommends is that planned by the Second Hague Conference under the name of the Court of Arbitral Justice. The Hague convention which provides for the court does not confer on it the power to

hale nations into court nor to enforce its judgments. The signatories to the convention are not even to bind themselves to use the court. Like existing institutions at The Hague, it will be there to use or not as the nations see fit.

This may seem an inadequate program. The great institution we are here to discuss this year, the Supreme Court of the United States, has more far-reaching powers. While, in the opinion of some, it is not vested specifically with the power to enforce its judgments against a state, we are confronted with the big fact of the Civil War, which left no room for doubt that forceful resistance to the lawful authority of the Federal Government, or any branch of it, on the part of a state is not tolerated. Moreover, the Federal Government will not permit any two states to go to war with each other over a dispute. And when states are forbidden to settle a dispute by fighting, sooner or later they find some other way to settle it. The precise extent of the powers of the Supreme Court and how they operate are questions we are here to discuss.

Now what are our reasons for denying like powers to the proposed International Court?

On March 17 last, Viscount (then Sir Edward) Grey, while approving the program of the League to Enforce Peace, remarked to me that he would go even further and enforce the judgment or award of the tribunals we propose to set up, both court and Council of Conciliation, if the people would stand for it. He held with Mr. Taft that to gain so great an end—the avoidance of war—nations should be willing to give and take. But several attempts to draw from him an expression of opinion as to

whether the Great Powers would in fact accept such a provision were unavailing. And this is the point. It is not a question of desirability but of practicability. The proposed court will not be the instrument of a federated world state but only of a conglomeration of states which we like to call a Society of Nations. The court will be set up in the hope and confident belief that it will prove its usefulness and that growing prestige will bring to it a larger and larger percentage of justiciable disputes as time goes on.

This Society has undertaken a scientific study of the principles involved in judicial settlement and this is still its principal activity. Its present program is a continuance of that study, for it is generally conceded that the operations and powers of our great court will be a subject of close examination by the men entrusted with inaugurating a world court.

A kindred society, the World's Court League, was founded to win for the project the support of the people of this country. The two societies can well work hand in hand.

Now, in what respect does the common aim of these two societies differ from that of another group which has likewise won recognition at the hands of statesmen, viz., the League to Enforce Peace? The last named has, as its first plank, a demand for a world court. The court it has in mind is identically the same as that demanded by the Judicial Settlement Society and the World Court's League. It is to be endowed with the same powers and, as a court, to have the same limitations. There is no provision for bringing offenders into court and none for enforcing the judgment.

Under the League a dispute may go on indefinitely without any attempt to bring the disputants into court, just as our Fisheries Dispute with Great Britain dragged along for the greater part of a century. A people may be practising a gross injustice toward another people, may refuse the demand of the latter for a hearing, and the dispute may even flame up into war without the League having the right to interfere. For there is only one act which the League punishes, namely, the making of war against a fellow signatory without a previous hearing of the dispute or an honest attempt to secure one. In the case imagined above, the injured signatory has made a demand for a hearing and been refused. It is thus relieved of all obligation to the League and is free to attack the offending signatory. The latter in turn is not visited with any penalties at the hands of the League because it is not making the attack but is itself attacked. Lacking the power to hale the offender into court, it is therefore clear that while the demand for a preliminary hearing of the dispute or honest attempt to secure one before a signatory is allowed to attack a fellow signatory will make for justice, the League plan does not pretend to insure justice. It aims simply to discourage war.

But in relation to the projected world court it does mark an advance on the Hague convention in two respects:

- (a) The signatories obligate themselves to use the institutions they set up; and
- (b) The League will employ its military power forthwith against any signatory which goes to war in violation of its agreement.

The judicial power of the World Court, like that of the Supreme Court of the United States, will not cover political questions.

All men recognize the fact that disputes involving conflicts of political policy cannot be composed in a court of law or equity. And they are the really acute and dangerous disputes most likely to lead to war. Recognizing these limitations of a true court, the League plans to set up another body to deal with non-justiciable questions, namely, a council of conciliation. It is not considered practicable to make the decisions of that body binding either—if indeed it will even proceed to a recommendation in all cases.

As regards purely justiciable questions, among the English publicists studying this problem there is a group who believe that, under a league of nations, the judgment of a true court dealing with such questions ought to be binding. The present program of the League to Enforce Peace does not provide for this but some of our own group likewise believe that nations ought to be willing to abide by the decisions of a court in purely justiciable questions. That which causes us to hesitate actually to recommend it is again a practical difficulty, namely, our belief that nations will be loath to accept such a provision. As the court would itself pass upon questions of jurisdiction, it might designate judicial some questions which are really political, a result which the nations would regard as serious if the decision were binding.

There is another point at which the interests of the Judicial Settlement Society and those of the League to Enforce Peace touch intimately. It is that feature of

the latter's program which calls for conferences to "formulate and codify" rules of international law. It need not be pointed out how the formulation of international law, by removing an ever greater number of questions from time to time from the field of uncertainty and doubt, not only removes just that many more disputes from the arena of politics to that of law, but makes markedly for the firm establishment of a tribunal by providing the basis for its operation. Men immediately ask, "Of what use is the labor of conventions, of chancelleries, of writers and of judges who have given painstaking and careful thought to the upbuilding of international law when, in a time of crisis like the present, the results of that long labor are practically swept aside?" They ask naturally whether nations hereafter will be inclined to regard any rules of international law as binding or place any confidence in their observance when the test comes.

The events of the past few years have indeed subjected to a severe strain our estimate of what may be expected of men and nations in our day of supposed enlightenment and humanity. In the breasts of many the cord of confidence has snapped. Are they right or are the men who hold to the old faith right?

There has been treachery and disregard of honor and a throwing down of chivalry. Technical development, successful government of cities, astonishing results in dealing with poverty, progress in all departments of science, and, above all, education of the masses, which latter was supposed to lead to the reign of reason—what a sorry spectacle of failure they all offer! The acts committed in this war—the great war itself—were simply unbelieva-

ble before the event. If people so gifted and endowed can be tricked by ruling classes into acts so unworthy, if the native virtues and humane qualities which undoubtedly characterize them can be overborne in passionate hate and turned in a single hour into folly and flaming madness, can we count upon any people to hold true to the ideals of our day?

These are the questions which every thoughtful man is putting to himself and they have caused some of the most experienced to readjust their estimates.

Now let us look at the other side of the picture. To offset the perfidy, we have in this war examples of entire faithfulness to treaty obligations. We behold in some performance better than the promise. On the part of a large group of nations the events of the war have actually strengthened confidence in each other. Second sober thought suggests that the world will recover from the shock to its faith in treaties. It must recover. Without such confidence conditions will be impossible. Confidence not only in the written and spoken word but confidence in the good intentions of the neighboring state constitute the very basis of all tolerable relations. Without it any untoward incident may flame up into war.

It would be folly to assert that this restoration of confidence will be immediate. The shock has been too great. For many years nations will be on their guard. They will probably maintain stronger armies and navies than hitherto. But we shall have a final recovery of the loss which the great war has caused, progress in all lines of international endeavor will be resumed, and it is not impossible that by a working international agreement, if

statesmen have the vision required to frame and establish such, the very pace of progress in this direction may be increased.

THE PRESIDING OFFICER: The next speaker inherits his interest in this topic. He comes from a long line of students of the law. Professor Minor, of the University of Virginia, is known to us through his writings and his public activities. It gives me great pleasure to present him.

PROCEDURE BY DEFAULT IN SUPREME COURT AGAINST DEFENDANT STATES

RALEIGH C. MINOR

If we would fully comprehend the difficulties inherent in the questions here to be discussed, we must in imagination throw ourselves back for a moment into the early period of our constitutional history and into its political and judicial atmosphere.

Three years have passed since 1789, when the federal convention submitted the Constitution, now duly ratified by conventions of the people in the several states. Under that Constitution the government of the United States has been organized, and the Supreme Court of the United States, by no means possessed as yet of the dignity and authority which now inform it, is sitting to adjudicate the causes which, under the Constitution and laws of the Union, may be brought before it.

Among these are "controversies between two or more states; between a state and citizens of another state
. . . . and between a state, or the citizens thereof,

and foreign states, citizens or subjects." And the Constitution has expressly declared that "in all cases . . . in which a state shall be a party, the Supreme Court shall have original jurisdiction."

Here we behold the elements of one of the grandest experiments ever made in the field of political science, the successful outcome of which will mark perhaps the most important revolution in the political history of the world. The States that have thus solemnly undertaken to leave all their disputes to the decision of this tribunal have been accustomed to regard themselves as sovereign States in all respects save the comparatively few wherein they have surrendered their powers to the newly organized Federal Government. No European nation of today could be more jealous of its sovereignty and independence than are the States just entering upon this governmental enterprise.

Will it—can it—succeed? Will it be possible to induce these States to yield gracefully to judgments rendered against them by this tribunal, or will they decline to obey the mandates of the court, or, worse still, resist the enforcement of its decrees? Will they deny the court's right to do more than render judgments, leaving it to the good will of defendant States whether the mandates shall be obeyed, or to the discretion of plaintiff States whether they shall themselves undertake to enforce them? If the decision be against the plaintiff State, will it consent to abide by the judgment of the court, or will it be likely to disregard it and seek to enforce its alleged rights *vi et armis*? By what process shall a defendant State be summoned to appear before this supreme tribunal, and, when

summoned, if it refuse to appear or to recognize the jurisdiction of the court, shall its presence be compelled, or shall judgment by default be rendered against it, or shall the court decline to pronounce judgment for lack of jurisdiction? Shall the sovereignty of the State be a shield to protect it from suits prosecuted against it by individuals, or does the court's jurisdiction extend even to such cases?

These are some of the questions that present themselves to the minds of the justices of the court, the lawyers practising at its bar, and the statesmen of the country, when it is announced in 1792 that a suit has been instituted in the Supreme Court of the United States by the State of Georgia against one Brailsford, a British subject, to enjoin him from the recovery of a sum of money claimed by Georgia under her acts of confiscation during the Revolutionary War. But it is speedily seen that this is not the sort of case to raise the momentous questions above suggested. It is true the plaintiff is a sovereign State, but the defendant is merely a private individual whose obedience to the court's decree can be easily compelled through the ordinary channels provided for the enforcement of judicial decrees. It is a case between a State as plaintiff and the citizen of a foreign State as defendant, and hence falls plainly within the judicial power of the United States and within the original jurisdiction of the Supreme Court. The court awards the injunction, and no doubt of its jurisdiction is even whispered.

The real test is yet to come. What will happen when it is sought to bring a sovereign State as a defendant before the court and to impose upon it the tribunal's decision?

We have not long to wait for an answer to some of these questions. Cases in which States are defendants begin to crowd the docket of the court. In the February term of 1793 two such cases are ripe for decision, and the court hands down its decision upon them.

One of these is an action at common law instituted by an individual named Oswald against the State of New York. The State does not appear on the return of the process, and thus is presented for the first time this important question: What is the effect of a State's failure to appear in answer to the process of the court? This question the court temporarily declines to answer fully, contenting itself with the entry of an order to the effect that "unless the State appears by the first day of the next term, or shows cause to the contrary, the judgment will be entered by default against the said State." This order leaves the matter open to a certain extent, since it seems to admit the possibility that the State might be able to show cause why the court ought not to assume jurisdiction in such case or enter judgment by default.

And, indeed, there is good reason to doubt whether jurisdiction ought to be assumed, seeing that the State of New York is a sovereign State, while the plaintiff is only an individual, and that the rule of international law prescribes that no sovereign State shall be sued without its consent. True the State, by its ratification of the Federal Constitution, has solemnly agreed that the judicial power of the United States shall extend to all cases "between States and citizens of other States" and that the Supreme Court shall have original jurisdiction in all cases "in which a State is a party;" but the feeling is

strong that the first of these provisions was intended to apply only to cases wherein a State is plaintiff, and that the States did not intend to surrender that attribute of sovereignty which would prohibit them to be sued by individuals without their own consent.

But in the great case of *Chisholm's Executors vs. the State of Georgia*, 2 Dall. 419, decided at the same term, upon practically the same state of facts, the court definitely settles these questions, settling them, however, in a way which causes profound uneasiness among the people, and leads to a successful agitation for an amendment to the Constitution in effect overruling the court's decision.

The opinion in *Chisholm vs. Georgia*, delivered in the February term of 1793—the same term that has seen the order entered in *Oswald vs. New York*—reaffirms the order in that case. After directing that the declaration against the defendant State be filed and that copies of it be served on the governor and the attorney general of the State of Georgia, the court orders that

“Unless the said State shall either in due form appear, or show cause to the contrary, in this court by the first day of the next term, judgment by default shall be entered against the said State.”

And in the February term of 1794, the State of Georgia remaining recalcitrant and declining to appear, a judgment by default is rendered for the plaintiff, and a writ of inquiry of damages is awarded.

The decision comes not only to the people of Georgia, but to the people of every State, as a distinct shock, and brings them to a sudden sense of the seriousness of the situation. The judgment actually rendered by default

against the State of Georgia at the suit of a private individual has aroused the fears and jealousies of the people on behalf of the sovereignty of the States to an extent much greater than might have been anticipated from the comparative calmness with which they had received the preliminary conditional orders of the court in *Oswald vs. New York* and *Chisholm vs. Georgia*.

But the agitation is directed only against that part of the decision which permits a judgment against a State at the suit of a private individual, and in no wise against the fact that a pecuniary judgment has been rendered against a State, or that that judgment has been rendered by default in the absence of a defendant State duly summoned to appear.

As a consequence of the general uneasiness, an amendment to the Constitution is promptly proposed and ratified as soon as may be by the legislatures of the requisite majority of States, taking its place as the eleventh amendment to that instrument.

The amendment in effect reverses the decision of the Supreme Court so far as that court, by its rulings in *Oswald vs. New York* and *Chisholm vs. Georgia*, has determined that the judicial power of the United States shall be construed to extend to suits instituted by private persons against States. It provides that

“The judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by citizens of another State, or by citizens or subjects of any foreign State.”

But there is nothing in this language in the least condemnatory of the principle established in those cases that, in actions at law instituted by one State against another, to which the judicial power of the United States does extend, and in which the Supreme Court does have original jurisdiction, the court may enter a judgment by default against an absent defendant State duly summoned to appear.

This tacit acquiescence of the several States and their people in the latter principle is pregnant with meaning if we remember the prevailing sentiment of jealousy on behalf of State sovereignty—the very sentiment, indeed, that is operating at the moment so strongly as to induce, with little or no dissent, the proposal and ratification of the amendment which denounces any construction of the Constitution justifying the suing of a State by an individual. The failure to denounce, at the same time, the other ruling—that a judgment by default might be rendered against a defendant State—is evidence of the highest sort that the people stand behind this portion of the decision, and recognize the necessity of such a ruling to the success of the grand experiment upon which they are embarked, whereby they hope to substitute the peaceful and judicial settlement of international disputes in the place of the dread arbitrament of arms.

It would, indeed, be hard to imagine a principle more essential to the success of such an experiment than the one here adopted, or one substantially similar. Without it, the court's jurisdiction would be entirely at the mercy of a State which might be defendant in any litigation, so that, should that State choose to withhold its appearance

in answer to process, the court would be powerless to impose its judgment upon the recalcitrant defendant.

As early, therefore, as 1793 and 1794, it has become the practice of the Supreme Court in actions at law that a defendant State may be summoned to appear at its bar, and that, in default of appearance after proper service of process, an order will be entered that unless the State appear by the first day of the next term, or show cause to the contrary, judgment will be entered by default against the said State, and, if necessary, a writ of inquiry will be awarded. Such orders have actually been entered in the cases of *Oswald vs. New York* and *Chisholm vs. Georgia*, but the pendency and ultimate ratification of the eleventh amendment puts an end to further efforts to execute them.

The mere tendency of the amendment, however, does not preclude the court from assuming jurisdiction of other cases instituted by private persons against States, so that it continues to receive and consider such cases until the final adoption of the amendment.

Among these are the cases of *Grayson vs. Virginia*, 3 Dall. 320, and *Huger vs. South Carolina*, 3 Dall. 339, decided respectively in 1796 and 1797, before the final ratification of the amendment.

These are suits in equity, not actions at law, and in each the defendant State has failed to appear after service of process, so that the court is called upon to determine what modifications, if any, shall be made in the rules of practice so far adopted in proceedings against absent defendant States.

In *Grayson vs. Virginia*, the counsel for the plaintiff

moved that a writ of *distringas* be awarded to compel the absent State of Virginia to enter an appearance, this being the method adopted by courts of equity and admiralty to compel the appearance of bodies corporate. He argued that there was no need of legislative authority to justify the court in issuing the writ, but that the court was competent to furnish all the necessary means for effectuating its own jurisdiction.

The court deduces from the general custom and usage of courts of equity and admiralty a general rule for the government of its proceedings, but declines to follow that usage to the extreme limit suggested by counsel, seeming, however, to admit that the rules of practice it adopts in this connection are "subject to the interposition, alteration and control" of Congress.

The court embodies its deductions in two general orders—the first dealing with the mode of summoning a defendant State, and the second with the procedure in equity cases should the defendant State fail to appear.

These two general orders have ever since controlled the procedure in suits brought against States in the Supreme Court, and are of such importance that they deserve to be quoted in full. They are as follows:

"1. *Ordered*, That when process at common law or in equity shall issue against a State, the same shall be served upon the governor or chief executive magistrate and the attorney general of such State;

"2. *Ordered*, That process of subpoena issuing out of this court in any suit in equity shall be served on the defendant sixty days before the return day of the said process; and further, that if the defendant, on such ser-

ice of the subpoena, shall not appear at the return day contained therein, the complainant shall be at liberty to proceed *ex parte*."

The first of these general orders seems merely to confirm and render compulsory the method of service of process already adopted in the case of *Chisholm vs. Georgia*. The only question, so far as I am aware, that has ever arisen under this rule, was made in the case of *Huger vs. South Carolina*, 3 Dall. 339, decided in 1797, the following year. In that case (which was also a case in equity) it appeared that a copy of the subpoena had been delivered to the attorney general of South Carolina; and that a copy had been left at the governor's house, where likewise the original had been shown to the Secretary of State.

Justices Iredell and Chace, says the report, "expressed some doubt whether showing the original to the Secretary of State would have been a service of the process conformably to the rule without leaving a copy at the governor's house; but they agreed with the rest of the court in deeming the service under the present circumstances to be sufficient in strictness of construction, as well as upon principle." And the report goes on to say that "the service of the subpoena being thus proved, the complainant was entitled to proceed *ex parte*; and accordingly moved for and obtained commissions to take the examination of witnesses in several of the States."

The second rule promulgated in *Grayson vs. Virginia*, applicable to suits in equity, was the complement of that for actions at law laid down in *Oswald vs. New York* and in *Chisholm vs. Georgia*. In those cases it will be remem-

bered, the defendant State not appearing, the court had ordered that "unless the State shall either in due form appear, or shall show cause to the contrary, in this court by the first day of the next term, judgment by default shall be entered against the said State," and in *Chisholm vs. Georgia* had actually at the next term entered judgment by default and awarded a writ of inquiry of damages.

The second order in the *Grayson* case was the court's answer to the demand of the plaintiff's counsel that a writ of *distringas* be issued to compel the appearance of the defendant State. The court declined to issue this or any other writ to coerce the appearance of a State, nor did it order, as it had done in the cases at law, a decree by default, nor, as in ordinary chancery practice, that the bill be taken for confessed, but, pursuing a middle course, ordered that the complainant might proceed *ex parte*; that is to say, the court refused to render a decree against an absent defendant State, even though duly summoned, save after a presentation of its case by the complainant State, and a trial of it, as far as possible, upon the merits.

So far as concerns the judgment against a State by default in actions at law, I have been unable to find any decision of the Supreme Court dealing with that question since the earliest cases, already mentioned, of *Oswald vs. New York* and *Chisholm vs. Georgia*.

But in equity, since *Grayson vs. Virginia* and *Huger vs. South Carolina*, there have come before the court two cases wherein, in the absence of the defendant State, the court has found it necessary to consider anew the rule of

procedure laid down in the Grayson case. Both were suits instituted by one State against another for the settlement of boundary disputes, and in both, the court sustained and extended the rule laid down in the Grayson case.

In 1831, the court handed down an opinion in the case of the State of New Jersey *vs.* the State of New York, 5 Pet. 284. New Jersey had filed against New York in the Supreme Court an original bill in the nature of a bill to quit title to certain territory claimed by both States as the result of unsettled boundaries. The State of New York, though properly summoned, had failed to appear and answer the bill, whereupon the court ordered that the State of New Jersey proceed *ex parte*, and prepare its case for final hearing, and, further, that a copy of the order be served upon the defendant State.

No better illustration can be had of the caution with which the Supreme Court has approached the method of dealing with an absent defendant State than is offered by the action of the court in this case. Though steadfastly maintaining its rule that a plaintiff State might proceed *ex parte* to develop its case, despite the absence of the defendant State, it recognized that patience ought still to be exercised, and the defendant still be given a *locus penitentiae*. The court expressly ordered not only that New Jersey proceed *ex parte* and prepare its case for final hearing, but that a copy of the order be served upon the defendant State of New York.

"If," says the court, "upon being served with a copy of such order, the defendant shall still fail to appear, or to show cause to the contrary, this court will, as soon there-

after as the cause shall be prepared by the complainant, proceed to a final hearing and decision."

The court adds, however, the following significant sentence: "But inasmuch as no final decree has been pronounced, or judgment rendered in any suit heretofore instituted in this court against a State, the question of proceeding to a final decree will be considered as not conclusively settled until the cause shall come on to be heard in chief."

The fact that before this date no final judgment or decree had been pronounced by the court against an absent defendant State is explained when we remember that all prior cases involving this question, from *Oswald vs. New York* to *Huger vs. South Carolina*, had been suits instituted against States by private persons, and that the eleventh amendment had been adopted before any of them had reached the stage of final judgment or decree.

In 1832, in 6 Pet. 323, this cause came on to be again heard upon the question whether the filing of a demurrer by the attorney general of New York, without entering an appearance in the cause, could be regarded as a compliance with the order that the defendant State "in due form appear" by the next term, or show cause to the contrary. The court held that the filing of the demurrer constituted a sufficient "appearance to answer the bill" within the meaning of the order.

There is one other case in which a defendant state has declined to appear in answer to a bill filed in the Supreme Court. This is the case of the State of Massachusetts *vs. the State of Rhode Island*, 12 Pet. 755, decided in

1838. The suit, however, was not actually decided on the merits until some years later.

In that case Rhode Island had filed a bill against Massachusetts to settle certain boundaries in dispute between them. Massachusetts had appeared by counsel and had filed an answer and plea to the bill, but had later moved to dismiss the bill for want of jurisdiction. The counsel for the State of Massachusetts, having understood from the language used by the court in overruling this motion, that it had based its decision upon the fact of the appearance, answer and plea of Massachusetts, asked leave of the court to withdraw that appearance.

The court, after assuring the counsel for Massachusetts that it had not intended to intimate that its jurisdiction in the case was dependent upon the appearance of the defendant State, permitted the State to withdraw its appearance, but at the same time authorized Rhode Island to proceed *ex parte* to the development of its case.

In the course of its opinion, the court especially referred to *Grayson vs. Virginia*, in which, it will be remembered, a demand had been made by the plaintiff for a writ of *distringas* to compel the appearance of the State of Virginia. The court, declining to do this, had issued instead an order that, if the defendant state remained absent after due summons, the complainant would be at liberty to proceed *ex parte*. And this was held in *Massachusetts vs. Rhode Island* to show that a defendant State's appearance is not to be coerced, even by prohibiting it to withdraw an appearance already entered.

Since 1838 no case has arisen wherein a defendant State has failed to appear and answer a complaint in the Su-

preme Court, so that our knowledge of the procedure in such cases must be gathered entirely from the decisions already commented upon. From these may be drawn the following:

SUMMARY OF CONCLUSIONS

1. *Service of process at law or in equity upon defendant State.* The proper mode of instituting a suit in the Supreme Court against a State, either at law or in equity, is to serve process upon the governor or chief executive magistrate (leaving it at his house if he be absent) and upon the attorney general.

2. *Procedure by default in actions at law against a State.*

a. In actions at law against a State, if the State do not appear in answer to the process, the court will direct the complainant's declaration to be filed, and copies of it to be served on the governor and attorney general of the defendant State, and will enter an order that "unless the said State shall either in due form appear, or show cause to the contrary, in this court by the first day of the next term, judgment by default shall be entered against the said State";

b. If the defendant State does not appear, as directed, by the first day of the next term, a writ of inquiry of damages may be awarded.

3. *Procedure by default in equity against a State.* a. In suits in equity against a State, if process of subpoena has been served upon the governor and the attorney general of the defendant State sixty days before the return day of the process, and the State does not appear at the return day contained therein, an order is entered that the com-

plainant State proceed *ex parte*, and prepare its case for final hearing;

b. A copy of this order is served upon the governor and the attorney general of the defendant State;

c. If, upon being served with a copy of this order, the defendant State still fails to appear, or show cause to the contrary, the court will, as soon thereafter as the cause shall be prepared by the complainant State, proceed to a final hearing and decision thereof;

d. The appearance of a defendant State will not be coerced by a writ of *distringas*, or otherwise; and if a State has entered an appearance, even though it shall have filed an answer and plea to the bill, it may withdraw its appearance, and will then occupy the same position as if it had never appeared;

e. The mere filing of a demurrer to the bill, by the attorney general of the defendant State, without the entry of any appearance, is a sufficient compliance with the order to appear and answer to the bill by the next term of court;

f. It has not yet been conclusively settled what shall be the nature and form of the final decree against an absent defendant State.

THE PRESIDING OFFICER: This is the annual meeting of this Society, and it is necessary to inject a little business. We need a committee on nomination of officers.

DR. SCOTT: I should like to make the motion that the Chair be authorized to appoint a committee of three to recommend officers for the Society, to report at the session tomorrow morning.

(The motion was duly seconded, and, the question being put, the motion was agreed to.)

THE PRESIDING OFFICER: I will name Mr. Everett P. Wheeler, Mr. Alpheus H. Snow and Mr. Jackson H. Ralston to report nominations of officers at the morning session.

The next speaker has been associated with this Society from the very beginning. We know what valuable contributions he has made to the literature on this subject. It gives me great pleasure to present Mr. Alpheus H. Snow.

EXECUTION OF JUDGMENTS AGAINST STATES

ALPHEUS H. SNOW

JUDGMENTS AGAINST STATES

In the Dred Scott case the parties were a black man and a white man; the former claiming emancipation from slavery because the latter, as his owner, had taken him from a slave-state to a free-soil state. The case came to the Supreme Court by virtue of its appellate jurisdiction. The judgment of the Supreme Court in favor of the white man as owner of the black man, was in fact a judgment against all the free-soil states, constituting about one-half the states of the Union; and it was and is so universally regarded. The attempt to compel the execution of the judgment as a precedent led to the Civil War. The execution of the judgment as a precedent was forever brought to an end by the adoption of the thir-

teenth, fourteenth and fifteenth amendments to the Constitution.

In the case of *Virginia vs. West Virginia* the parties were two States of the Union. It was brought in the Supreme Court of the United States as a court of original jurisdiction. The issue involved was whether West Virginia should pay Virginia a less or greater amount of money under a contract between them. A greater amount was adjudged to be due than West Virginia expected, and more than it thinks reasonable. A question of the compulsory execution of the judgment has thus arisen.

In the *Dred Scott* case the constitutional rights of the States of the Union were at issue, as well as the fundamental rights of all men to life, liberty and the pursuit of happiness, of which every state, equally with the Union, is the constitutional guardian. It dealt with tremendous questions, vital to all men and to all sociated groups of men everywhere and in all time.

In the *Virginia-West Virginia* case, nothing but money is involved. The issues are in no sense fundamental or vital. No constitutional right of any state is affected.

Clearly, the judgment in the *Dred Scott* case, though rendered in a suit between individuals was, in essence, a judgment against the free-soil states, equally as the judgment in the *Virginia—West Virginia* case, rendered in a suit between these states, was a judgment against the State of West Virginia. Moreover, considering the vast issues involved in the former case and the insignificant issues involved in the latter, it is reasonable to conclude that

issues vital to states may be involved equally in the one class of cases as in the other.

The question of the compulsory execution of the judgments of a court of a federal or federalistic union against a member-state of the Union, therefore, includes a consideration of the compulsory execution both of the indirect judgments rendered against states in suits between individuals and corporations, which we commonly speak of as judgments affecting states' rights; and of the direct judgments rendered in suits to which a state is a party defendant of record.

Moreover, it is important, in such an inquiry, never to minimize the importance of these indirect judgments against states; for a consideration of the principles of federal and federalistic unions will show that the indirect jurisdiction of Courts over the member-states is a necessary, permanent, and ineradicable incident of all such unions; and that the direct jurisdiction of Courts over states is not a necessary incident of such unions, but is an expedient which has been adopted only by such federal and federalistic unions as have deemed it suitable to their circumstances, and which has not yet been proved to be capable of universal application.

As illustrating the truth of the proposition that indirect judgments of courts against states are a necessary incident of all kinds of federal or federalistic unions, one may recall, in addition to the Dred Scott case, Calvin's Case, decided in 1607 by an English court, in which the relations of England and Scotland under the union of the two states in the person of King James, as James I

of England and James VI of Scotland, were adjudicated in a suit between individuals in their private capacity; the case of *Campbell vs. Hall*, decided in 1774 by an English court, in which the relations between Great Britain and the American Colonies as members of the federalistic union known as the British Empire, were adjudicated in a suit between individuals—the defendant being sued in an official capacity; and the *Insular cases*, decided between 1901 and 1912, by American courts and on appeal by the Supreme Court of the United States, in which the relations between the United States and the insular countries under its jurisdiction, together forming a federalistic union to which no name has yet been attached, were adjudicated in suits between individuals and corporations, suing or sued in private or official capacities.

As illustrating the truth of the proposition that it is not necessary that courts in federal or federalistic unions should have direct jurisdiction over the member-states, and that such arrangements are dictated in each case by expediency and effectuated by agreement between the states, one may refer to the various federal constitutions, written and unwritten, which have existed and which now exist. Such an examination would reveal few instances in which a direct jurisdiction over states has been conferred on courts. The Constitution of the United States and that of Australia would, indeed, be the most conspicuous examples of federal constitutions in which this jurisdiction is conferred on courts; but under these constitutions, equally with all other federal or federalistic constitutions, the courts also render indirect judg-

ments against the member-states. The absence of such a provision in the written or unwritten constitution of a federal or federalistic union does not mean that the courts have not jurisdiction over the member-states, but only that they exercise it indirectly.

By the Constitution of the United States, the jurisdiction to render a direct judgment against a member-state of the Union is confined to the Supreme Court; and for this purpose it is given original jurisdiction. Jurisdiction to render indirect judgments against states exists in all the courts within the United States. The Supreme Court of the United States has jurisdiction to render indirect judgments against states as an incident of its appellate jurisdiction, by virtue of which it reviews, on appeal, writ of error, or certiorari, judgments of the subordinate courts of the United States in all cases within their jurisdiction, and also judgments of the Supreme Courts of the States in cases arising under the Constitution of the United States. ✓

The execution of the direct judgments of the Supreme Court against a state is supervised by that Court directly. In the case of indirect judgments of the Supreme Court against a state by virtue of its appellate jurisdiction, the Supreme Court remands the case to the court below for judgment in accordance with its decision, and for execution of the judgment so to be rendered; and that court supervises the execution of the judgment. If, however, a state should oppose the execution of such an indirect judgment, the Supreme Court would doubtless participate in supervising the execution in every way permitted by the Constitution and statutes. ✓

The compulsory execution of any judgment of the Supreme Court against a state, whether the judgment be rendered indirectly in an action between individuals or corporations affecting states' rights, or directly in an action to which the defendant state is a party, proceeds on the same general principles. The judgment of the Supreme Court is in both cases an act of the United States; the opposition of a state to the execution of the judgment is in both cases the opposition of the State to an act of the United States. In order, however, to simplify the inquiry, it will be assumed in the following discussion of the nature, the source, the extent and the manner of exercise of the power of the United States which is exercised in compelling the execution of a judgment of the Supreme Court against a state, that the judgment has been rendered directly against the state in the exercise of the original jurisdiction of the Court.

THE NATURE OF THE POWER OF EXECUTION

In all civilized countries in which the Roman or the English system of law prevails, courts not only hear causes of disputes between individuals or corporations and render judgment, but also take certain action, after judgment, for the purpose of carrying the judgment into effect by compulsion, if compulsion proves to be necessary. The putting of a judgment into effect, by compulsion if found to be necessary, is called the execution of the judgment.

All compulsory execution of governmental acts or decrees is, as the name execution implies, an exercise of the executive power of the state or nation. When courts take

action for the compulsory carrying into effect of their judgments, they exercise executive, not judicial power.¹

An execution is only one form of the compulsory process of courts in the issuance of which courts exercise executive power. Subpoenas to compel the attendance of parties or witnesses, attachments of property pending suit, temporary injunctions, orders to produce testimony, as well as executions upon judgments, are manifestations of executive power wielded by the courts.

Accordingly, the compulsory writs issued by courts, including writs of execution, are not in the name of the court, but in the name of the chief executive of the state or nation of which the court is an organ; or in the name of the state or nation; or in the name both of the state or nation and of the chief executive.²

¹ Edmund Randolph, attorney general of the United States, in 1793, in the argument of the case of *Chisholm vs. State of Georgia*, 2 Dallas, 419, 428, said: "Perhaps, if a government could be constituted without mingling at all the three orders of power, courts should, in strict theory, only declare the law of the case, and the subject upon which the execution is to be levied; and should leave their opinions to be enforced by the executive power."

Chief Justice Jay, in delivering his opinion in the same case (p. 478) said: "In all cases of actions against states or individual citizens, the national courts are supported in all their legal and constitutional proceedings by the arm of the executive power."

In the case of *U. S. Bank vs. Halstead*, 10 Wheaton, 51, decided in 1825, Justice Thompson, in delivering the opinion of the court (pp. 61, 62, 64) said: "The power given to the courts over their process is no more than authorizing them to regulate and direct the conduct of the marshal, in the execution of the process. . . . It is a power incident to every court from which process issues, to enforce upon such officer a compliance with his duty, and a due execution of the process, according to its command."

² In Freeman on *Executions*, ed. 1900, Vol. 1, §§. 1, 39, it is said: "The writ of execution is a written command or precept to the sheriff or ministerial officer in writing and under the seal of the court, directing him to execute the judgment of the court. . . . The command of the writ may as properly be

In the courts of the United States, in pursuance of the evident purpose of the Constitution that the United States shall be sovereign and supreme within its allotted sphere, and the clear command of the Constitution that the President shall exercise the executive power of the nation, all writs of compulsory process have always been in the name of the President, as chief executive of the United States; the full formula for the beginning of all such writs being "The United States of America, ss: The President of the United States of America, To ——— Marshal, etc., Greeting:" Then follows a recital of the facts on which the action of the Marshal is to be based, and a command to the Marshal to take the compulsive action specified.³

The principle that all compulsory process of the United States courts shall be in the name of the President, as Chief Executive of the United States, is not established by any act of Congress or by any executive order of the President, but by a rule of the Supreme Court of the United States, adopted at its first session in 1790, and ever since continued as a fundamental and unalterable

regarded as the command of the law as of the court. . . . It has always been the custom in England to issue the writ in the name of the reigning sovereign, and in the greater portion of the United States in the name of the state or of the people of the state."

Blackstone (vol. 4, p. 122), speaking of "Contempts against the King's Prerogative," says that such contempts "may also be . . . by disobeying the King's lawful commands; whether by writs issuing out of courts of justice, or by summons to attend his Privy Council."

³ For the forms of writs in the United States courts see Appendix of Forms in *The Statutory Jurisdiction and Practice of the Supreme Court*, by P. Phillips; also in *Jurisdiction and Procedure of the Supreme Court of the United States*, by Hannis Taylor; also in *A Treatise on Federal Practice*, by Roger Foster.

principle of action of the United States courts in the issuing of compulsory process of any kind.⁴

⁴ At the first session of Congress held in 1789, the first action taken by the Senate, on April 1, was to appoint a committee, with Senator Oliver Ellsworth (afterwards chief justice of the United States) as chairman, "to bring in a bill for organizing the judiciary of the United States." The bill was brought in on June 15 and was debated on eighteen days. After having been recommitted and reported back on July 13, it was passed by the Senate on July 17. This bill contained no provisions concerning process, except that by the 14th section all the United States courts were authorized to issue "writs of *scire facias*, *habeas corpus*, and all other writs not specially provided for by statute, which, may be necessary for the exercise of their respective jurisdictions, and agreeable to the principles and usages of law."

The House of Representatives held the bill as passed by the Senate under consideration for nearly two months, there being considerable opposition to the system of circuit and district courts proposed; but on September 17 accepted the bill in principle though with amendments respecting details. These details were adjusted and the bill became a law on September 24.

On September 17, when it was evident that the bill for organizing the courts was certain to be adopted, the original Senate committee which had reported the bill for organizing the judiciary reported, through Senator Richard Henry Lee of Virginia, a bill "to regulate processes in the courts of the United States" which was passed by the Senate on September 19. This bill provided that "all writs or processes, issuing out of the Supreme or Circuit Courts, shall be in the name of the President of the United States." The House of Representatives objected to this provision and amended the bill so as to require all such writs and processes to be "in the name of the United States."

The only speech in either House on this amendment, preserved in the *Annals of Congress*, is that of Mr. Stone, of Maryland. Speaking in favor of the House amendment, he said, as reported in the *Annals of Congress* on September 25:

"He thought substituting the name of the President, instead of the name of the United States, was a declaration that the sovereign authority was vested in the executive. He did not believe this to be the case. The United States were sovereign; they acted by an agency, but could remove such agency without impairing their capacity to act. He did not fear the loss of liberty by this single mark of power; but he apprehended that an aggregate, formed in one inconsiderable power and another inconsiderable authority, might, in time, lay a foundation for pretensions it would be troublesome to dispute, and difficult to get rid of. A little prior caution was better than much future remedy."

Both Houses insisted on their respective views and a conference committee failed to find a solution for the dispute. On September 28, the Senate amended the bill by striking out the whole sentence above quoted concerning the style of

The courts of the United States, in thus wielding the executive power of the United States, authenticate or, as the legal expression is, "teste" the writ of the President. This authentication is provided for by act of Congress.

the writ, by omitting all reference to the Supreme Court in the section in which it occurred, and by providing that in the Circuit and District Courts, "the forms of writs and executions, *except their style*, and modes of process" should be as therein specified—thus leaving the style of writs and executions in all the courts of the United States to be determined by rule of the Supreme Court or by a statute to be subsequently enacted.

The Supreme Court, consisting of John Jay, as chief justice, James Wilson, of Pennsylvania, William Cushing, of Massachusetts and John Blair, of Virginia, held its first session, according to the provisions of the Judiciary Act of 1789, on February 1, 1790, and on February 3, 1790, adopted a rule on the subject of the style of writs, which in substance has remained unchanged to this day. In its original form the rule was as follows (2 Dallas, 399):

"Ordered, That (unless, and until, it shall be otherwise provided by law), all process of this court shall be in the name of the President of the United States."

Congress in 1792, passed a fuller statute relating to processes in the United States courts, expressly excepting from the statute "the style of writs" and giving the Supreme Court power to modify by rule the methods of proceeding on execution specified by the statute and power to make rules for the Circuit and District Courts. Under the statutes relating to process above referred to, the practice seems to have been adopted by the Supreme Court, and also by the Circuit and District Courts without any special rule or order being made on the subject, of issuing all writs of compulsory process in the form stated in the text, namely "The United States of America ss. The President of the United States," etc. It seems reasonable to infer that this form was selected with a view to meeting the demand of the Senate that all compulsory process should be in the name of the President, and of the House of Representatives that it should be in the name of the United States. The meaning of the formula seems to be that the compulsory processes of the United States are the commands of the United States, as sovereign, acting by the President, as chief executive of the United States, addressed to the ministerial officers of the United States. By adoption of this formula, it was made clear that resistance to the lawful acts of the marshal is a crime against the sovereignty of the United States of the nature of treason, and not a crime against the court or the executive in the nature of a contempt; and that the President in enforcing the process of the United States courts does not act as sovereign, but as chief executive of his sovereign, the United States.

In the Supreme Court, the authentication or "teste" is by the Chief Justice; but even he does not actually sign the writ, the actual signature, according to the statute, being by the clerk of the Supreme Court.⁵

A writ of execution of a judgment of the Supreme Court of the United States against a state, is thus the act of the United States of America, as sovereign within its sphere, and of the President of the United States, as Chief Executive of the United States, authenticated by the Supreme Court, addressed to the subordinate executive officer of the United States designated by the statute for the purpose—the United States marshal at large, styled by the statute the marshal of the Supreme Court,⁶ advising him of the judgment rendered, specifying the mode of execution, and commanding him to execute the judgment in the manner specified. As the marshal acts in the name of the United States and of the President, the writ calls into operation the whole moral influence of the United States, to be wielded by the President as Chief Executive and the whole physical force of the United States, if need be, to be wielded by the President as Commander-in-Chief of the Army and Navy of the United States and of such part of the militia of the states as may be summoned into the service of the United States by authority of Congress and by executive order.

⁵ The first section of the Process Act of 1789, which has continued to this day, provided that "all writs and processes issuing from the Supreme or a Circuit Court shall bear test of the chief justice of the Supreme Court, and if from a District Court, shall bear test of the judge of such court, and shall be under the seal of the court from which they issue; and signed by the clerk thereof."

⁶ By sections 219 and 224 of the Judicial Code of 1911, the marshal of the Supreme Court is appointed by the court, and is required to "serve and execute all process and orders issuing from it."

THE SOURCE OF THE POWER

The question arises: By what constitutional authority do the courts of the United States thus wield the executive power of the United States in the name of the Chief Executive? The executive power of the United States is by section 1, article II, of the Constitution, "vested in a President of the United States." The judicial power of the United States is, in equally clear and precise words, by section 1, article III, "vested in one Supreme Court, and in such inferior courts as Congress may from time to time ordain and establish." Congress is by section 8 of article I and by other provisions of the Constitution granted certain specific powers, but none of these provisions has any bearing on the question except the tenth clause of section 1 of article VIII, which provides that Congress shall have power "to make all laws which shall be necessary and proper for carrying into execution the foregoing powers, and all other powers vested by this Constitution in the government of the United States, or in any department or officer thereof."

* It is evident from the whole Constitution and from the words and acts of the framers in the Constitutional Convention, that the United States courts were intended to have the usual executive powers of courts; and the almost unanimous view of legislators, executives and courts has always been that these executive powers are derived from the grant of "the judicial power" made by the Constitution to the Supreme Court and to the other courts of the United States, as being necessarily implied in that power by the custom and usage of civilized nations.

Courts have exercised this incidental executive power over their process in aid of their jurisdiction for many centuries. The practice apparently arose in the last days of the Roman Empire. Under the Roman system of early days, the judgment plaintiff was permitted, by proceedings before the magistrate, to seize the person of the judgment defendant in satisfaction of the judgment and keep him in slavery. Later on, the seizure of all the property of the judgment defendant by the judgment plaintiff was substituted for enslavement. At a later period, the *praetores*—the local chief executives—authorized or instituted arrangements for making a division of the debtor's property among all his creditors. In the last days of the Roman Empire, the *praetor*, after rendering judgment in person or by a judge appointed by him, attended to the execution of the judgment, using military force if necessary. Both in rendering judgments and in executing them, all the Roman judicial tribunals and executives acted in the name of the emperor. From this system it resulted that the judicial tribunals gradually came more and more to superintend the execution of judgments.⁷ Doubtless this produced a humane and reasonable execution of the orders and judgments of these tribunals; for the practice was taken over into the judicial system of Continental Europe and of England at an early date. In England, failure of the sheriff to obey the lawful commands of the court was by statute made a crime of the nature of contempt, and resistance to an officer in executing the lawful commands of the court was

⁷ See *The Institutes of the Roman Law*, by Dr. Rudolph Sohm (translated by Ledlie, 2d ed., 1901), p. 317.

made a crime of the nature of treason. The practice passed from England to the American Colonies, and they continued it when they became states, though their constitutions recognized the division of powers into the legislative, executive and judicial, and placed each power in charge of a special governmental organ.

Under the circumstances it was natural that the framers of the Constitution should have refrained from inserting in it an express grant to the courts of the United States of all the executive powers then exercised by courts of the states. Such a grant would have been inconsistent with the division of powers made by the Constitution. Moreover it was unnecessary, since the people of the states and the states themselves were logically forced either to recognize that the United States courts had these executive powers as an incident of "the judicial power" granted to them, or to revolutionize the practice of the state courts.

In view of the fact that the Constitution makes no express grant of these executive powers to the United States courts and that these powers are derived by implication from the grant of the judicial power, Congress
* has always refrained from enacting any statute which should purport to grant to the United States courts these executive powers. Such an act, if passed, might have been claimed to show that Congress considered that no warrant could be found in the Constitution for the exercise of such powers; and there would have been danger that such a statute might have been held unconstitutional as an attempt by Congress to confer executive powers on the judiciary. Congress has, however, by various

statutes, passed at various times, recognized that the United States courts have power, under the Constitution, to issue and control all necessary compulsory process in aid of their jurisdiction, as a power derived from the Constitution, and has by statute effectuated and regulated the exercise of these powers. Thus in 1789, Congress by the fourteenth section of the Judiciary Act, empowered the United States courts to issue the writs of *habeas corpus* and *scire facias*, "and all other writs which may be necessary for the exercise of their jurisdictions, and agreeable to the principles and usages of law." This Judiciary Act also provided for the appointment of a United States marshal to attend the United States courts in each district, and required the marshal to "execute all lawful precepts directed to him and issued under the authority of the United States," giving him power "to command all necessary assistance in the execution of his duty." The Process Act of 1789 provided for the manner in which "all writs and processes" of the United States courts should "bear teste." By this act as finally amended in 1792, certain general principles were established as respects process in actions in the United States courts, and they were authorized to make rules regarding process, not inconsistent with the statutes, subject to the general rules provided by the Supreme Court. These statutory arrangements have continued with slight changes to this day.

The Supreme Court, as was to be expected, has always firmly asserted its power and the power of all the United States courts to issue all compulsory process necessary for the exercise of their respective jurisdictions. It has

held that this power is derived by necessary implication from the grant of "the judicial power," and is exercised by the courts according to the principles established by Congress in its legislation for effectuating and regulating the exercise of the power, and according to the rules of court, not inconsistent with the statutes, these rules being governed by the general rules prescribed by the Supreme Court.⁸

⁸ In the case of *Wayman vs. Southard*, 10 Wheaton, 1, decided in 1825, Chief Justice Marshall, delivering the opinion of the court, said (pp. 21, 23):

"One of the counsel for the defendants insists . . . that the government of the Union cannot, by law, regulate the conduct of its officers in the service of executions on judgments rendered in the Federal Courts; but that the state legislatures retain complete authority over them. The court cannot accede to this novel construction. The Constitution concludes its enumeration of granted powers with a clause authorizing Congress to make all laws which shall be necessary and proper for carrying into execution the foregoing powers, and all other powers vested by this Constitution in the government of the United States, or in any department or officer thereof. The judicial department is invested with jurisdiction in certain specified cases, in all which it has power to render judgment. That a power to make laws for carrying into execution all the judgments which the judicial department has power to pronounce, is expressly conferred by this clause, seems to be one of those plain propositions which reasoning cannot render plainer. . . . The jurisdiction of a court is not exhausted by the rendition of its judgment, but continues until the judgment is satisfied. Many questions arise on the process subsequent to the judgment, in which jurisdiction is to be exercised. It is, therefore, no unreasonable extension of the words of the act [the section of the Judiciary Act giving the United States courts power to issue all writs necessary to the exercise of their jurisdiction] to suppose an execution necessary for the exercise of jurisdiction."

In the case of *United States Bank vs. Halstead*, 10 Wheaton, 51, decided in 1825, Justice Thompson, delivering the opinion of the court (p. 64), said:

"An execution is the fruit and end of the suit, and is very aptly called the life of the law. The suit does not terminate with the judgment; and all proceedings on the execution are proceedings in the suit, and which are expressly, by act of Congress [the Process Act] put under the regulation and control of every court from which process issues."

See also *Gordon vs. the United States*, 117 U. S., 697, 702, 704.

THE EXTENT OF THE POWER

Congress has never attempted to define the limitations upon the power of the Supreme Court in cases of which it has original jurisdiction. In these cases, the court by its own interpretation of the constitutional grant of power, determines both the limitations of its own jurisdiction and the extent of its executive powers in issuing compulsory process in aid of its jurisdiction. The rules concerning execution of judgments which Congress has enacted apply to cases in the Supreme Court of which it has appellate jurisdiction and to all cases in the other courts of the United States. These rules are, that execution in actions at law shall be levied in the same manner as in a court of the state in which the execution is levied, and that execution in actions of equity and admiralty shall follow the rules observed in equity and admiralty courts at the time the Constitution was adopted. These provisions are no doubt to be observed by the Supreme Court

The provision of the Process Act of 1789, authorizing the United States courts to issue all writs "which may be necessary to their respective jurisdictions, and agreeable to the usages of law" has never been changed. (See sec. 262 of the Judicial Code of 1911). Nor has the provision relating to the manner in which process shall bear teste. (See Revised Statutes U. S., sec. 911.)

In *Ex parte Siebold*, 100 U. S., 371, Mr. Justice Bradley, delivering the opinion of the court, said:

"We hold it to be an incontrovertible principle, that the government of the United States may, by means of physical force, exercised through its official agents, execute on every foot of American soil the powers and functions that belong to it. . . . It must execute its powers, or it is no government. It must execute them on the land as well as on the sea, on things as well as on persons. And, to do this, it must necessarily have power to command obedience, preserve order and keep the peace; and no person or power in this land has the right to resist or question its authority, so long as it keeps within the bounds of its jurisdiction."

in cases of its original jurisdiction, so far as they are applicable.

Inasmuch as the Supreme Court, in cases of its original jurisdiction, determines the limits of its jurisdiction, it has power to hold that it has no jurisdiction in particular classes of cases between states, to determine what kinds of property of the defendant state is entitled to exemption from execution, and to establish the principles upon which it will act in refusing on grounds of public policy to issue a writ of execution. When it holds that it has no jurisdiction of a designated class of cases between states the decision necessarily also operates as a limitation upon the executive powers of the court. Whenever it holds that certain kinds of property owned by states are exempt from execution, and whenever it denies a motion for a writ of execution against a state on grounds of public policy, it plainly establishes limitations upon its executive powers.

The Supreme Court has held that it has no jurisdiction of cases between states in which the complaining state comes before the court "as *parens patriae*, trustee, guardian or representative of all its citizens," seeking reparation from the defendant state for some injury done by it acting in a similar representative capacity for all of its citizens; but that those cases between states only are justiciable which have for their purpose the obtaining of reparation for "a special and peculiar injury" committed by the defendant state on the plaintiff state of such character "as would sustain an action by a private person."⁹

⁹ State of Louisiana vs. State of Texas, 176 U. S. 1, 17.

The Supreme Court has never yet had occasion to decide to what extent the Constitution limits the jurisdiction of the Supreme Court by confining its jurisdiction to "controversies between two or more states." The Judiciary Act of 1789 interpreted the word "controversies" by using the expression "civil controversies." Justice Iredell in the case of *Chisholm vs. State of Georgia*, 2 Dallas, 419, 431, stated that the word "controversies" was used so as to exclude all criminal cases, from which it would appear to be a natural inference that the Supreme Court has no jurisdiction of actions between states which are based on an alleged wrongful motive or intent of the defendant state.

The Supreme Court has held that "the public property held by any municipality, city, county or state is exempt from seizure upon execution, because it is held by such corporation, not as a part of its private assets, but as a trustee for public purposes."¹⁰

The court has also held that it will not issue an execution upon a judgment against a state when it appears that the state has no means of satisfying the judgment except through the exercise of its taxing power.¹¹

In the case of *Virginia vs. West Virginia*, which is now pending in the Supreme Court, on a motion for an execution on a money judgment of \$12,000,000 and interest rendered in favor of Virginia, a claim is made by West Virginia that the Supreme Court has no power to issue execution on a money judgment against a state. The court

¹⁰ In the case of *South Dakota vs. North Carolina*, 192 U. S. 286. Opinion of the court by Justice Brewer, p. 318.

¹¹ *Rees vs. City of Watertown*, 19 Wallace, 107, 116, 117.

has denied the motion for execution, in order to give the legislature of West Virginia an opportunity to provide for the payment of the judgment. If no such provision is made, however, Virginia has permission to renew the motion for an execution, and the court will doubtless decide upon the point raised by West Virginia.

During the time that the American Union existed under the Articles of Confederation, suits by individuals against states were sometimes brought in state courts and the rule was then established that no action for a money judgment would lie against a state, on the ground that a state court could not enforce execution of such a judgment.¹² Only in cases where property belonging to a state was found within the jurisdiction of the court of another state, could the court take jurisdiction, and not even then unless the suit was *in rem*, that is, against the property itself, to determine the title to it or liens upon it. It was thought inconsistent with state sovereignty that any compulsion should be placed upon a state on account of a contract debt; and, to avoid the question of execution, the state courts declined to take jurisdiction. That all compulsion of states is war, is self-evident. Hamilton, in No. 81 of the *Federalist*, recognized this when he said, arguing against the jurisdiction of the United States courts in actions brought by individuals on debts due by the states: "To what purpose would it be to authorize suits against states for the debts they owe? How could recoveries be enforced? It is evident that it could not be done without waging war against the contracting state: and to ascribe to the Federal courts, by

¹² *Nathan vs. Commonwealth of Virginia*, 1 Dallas, 77.

mere implication, and in destruction of a pre-existing right of the state governments, a power which would involve such a consequence would be altogether forced and unwarrantable." The sentiment of civilized mankind seems to be crystallizing on the proposition that an unpaid debt is not adequate as a cause of war. Although the Convention respecting the Limitation of Force in the Recovery of Contract Debts adopted by the second Hague Conference permits the use of force when the debt has been reduced to judgment by an arbitral award, nevertheless the principle underlying that Convention is the broad principle above stated—that an unpaid debt is not an adequate cause of war; so that ultimately the Convention may be extended to cover even contract debts reduced to judgments. The claim made by West Virginia in bar of the power of the Supreme Court to issue execution on a money judgment may, therefore, quite possibly be upheld by the Supreme Court.

The only case in which the court has ever taken proceedings of the nature of execution, after judgment against a state, would appear to be that of the State of South Dakota *vs.* State of North Carolina,¹⁸ but in this case there was property of North Carolina not used by it for any public purpose which was within the control of the court. The suit was brought by South Dakota on bonds owned by it which had been issued by North Carolina, and which were secured by railroad stock owned by North Carolina and mortgaged by it to the holder of the bonds to secure their payment. The court rendered judgment on the bonds and ordered the mortgaged stock sold by

¹⁸ 192 U. S. 286.

the marshal of the Supreme Court on foreclosure. Though the proceeding was not *in rem*, yet it may be claimed to fall within the principle applied by the state courts in suits against states during the period of the Confederation.

In considering the extent of the power of the Supreme Court to execute judgments against states, it is proper always to bear in mind that the executive powers were conferred on courts in the days when courts dealt only with individuals as litigants. The reasons for conferring and continuing these powers doubtless were that the courts proved themselves to be able, through the sheriff, aided by the *posse comitatus*, to execute their judgments against individuals, and to execute them more conveniently, more expeditiously, more humanely, and more justly, than the executive department of the government. These reasons do not apply to courts which deal with states as litigants, in which execution of the judgment is only another name for civil war. The marshal with all the assistance he can command is powerless in dealing with a state. If judgments against states are to be executed, the combined moral influence of the Supreme Court, the President and the Congress must be exerted, the special responsibility resting upon the President, and the whole physical force of the United States must be used, if necessary to maintain the majesty and power of the United States and its legal right of supremacy when acting within its allotted sphere.¹⁴

¹⁴ In the case of *Chisholm vs. State of Georgia*, 2 Dallas, 419, Justice Blair said (p. 451):

"Nor does the jurisdiction of the court, in relation to a state, seem to be questionable, on the ground that Congress has not provided any form of execu-

It is doubtless in view of this impossibility of courts going very far in executing judgments against states that all the tribunals of which history gives us information which have been granted jurisdiction in controversies between states or nations have not been endowed with any executive powers, but have been compelled to rely upon an agreement of the litigants in advance to abide by the judgment or to certify their judgments to an executive upon which the responsibility for executing the judgment or declining to execute it, was placed.

Thus the Imperial Chamber established in 1495 in the Holy Roman Empire, which is referred to by Hamilton, in No. 80 of the *Federalist*, as the prototype of the United States Supreme Court regarded as a tribunal for the pacific settlement of interstate disputes, had no executive powers; but only certified its judgments to the Imperial Council, which with the Emperor constituted the executive and legislature of the Empire. The Imperial Council decided whether or not to execute the judgment, and determined the manner and form of the execution in each case.¹⁵

tion, or pointed out any mode of making the judgment against a state effectual. The argument *ab inutili* may weigh much in cases depending upon the construction of doubtful legislative acts, but can have no force, I think, against the clear and positive directions of an act of Congress and of the Constitution. Let us go on as far as we can; and if, at the end of the business, notwithstanding the powers given us in the fourteenth section of the judicial law [the power to issue all writs necessary for the exercise of jurisdiction], we meet difficulties insurmountable to us, we must leave it to those departments of government which have higher powers; to which, however, there may be no necessity to have recourse. Is it altogether a vain expectation that a state may have other motives than such as arise from the apprehension of coercion, to carry into execution a judgment of the Supreme Court of the United States, though not conformable to [its] own ideas of justice?"

¹⁵ *Geschichte der Deutschen*, by M. I. Schmidt, (ed. 1808), vol. 4, pp. 364, 390.

The various political committees of the English and British Privy Council which had jurisdiction to hear and determine intercolonial disputes and disputes between the colonies and the mother country, had no executive powers, but merely certified their judgments to the King by way of advice to him; and he, advised by his whole Council, as chief executive, determined the question of execution.¹⁶

The Permanent International Arbitration Court established by the first Hague Conference has no executive or legislature to execute its awards. In lieu of this, litigant nations are required to agree in advance to accept its award.¹⁷ This is plainly compulsion; for though the nations are free to use the tribunal or not, it is impossible for any nation to use it without placing itself under moral obligation to the other nation and to the Society of Nations. The moral influence of the court is thus diminished and no method is provided for executing its

¹⁶ The final section of the Instructions of Charles II to the Council of Foreign Plantations, of December 1, 1660, was as follows: "You are hereby required and empowered to advise, order, settle and dispose of all matters relating to the good government, improvement and management of our foreign plantations, or any of them, with your utmost skill, discretion and prudence; and in all cases wherein you shall judge that further powers and assistance shall be necessary, you are to address yourselves to us and our Privy Council for our further pleasure, resolution and direction therein." *The Administration of Dependencies*, by A. H. Snow, p. 82.

¹⁷ Convention for the Pacific Settlement of International Disputes, Art. 18 (1899); Art. 37 (1907); printed in *The Hague Conventions and Declarations of 1899 and 1907*, edited by James Brown Scott, pp. 55, 56. The Draft Convention relation to the creation of a Judicial Arbitration Court approved by the Second Hague Conference (printed in the same volume, pp. 31-39) has no provision for the execution of the judgments of the proposed court, nor does it appear that the nations which should adopt the convention would obligate themselves to conform to these judgments.

awards. It seems clear that courts having jurisdiction in controversies between states or nations should either give judgments which the litigants are free to accept or reject—in which case the moral influence of the court would have its maximum effect—or else should, as organs of a compulsive union of states, have their judgments executed by the executive and legislature of the compulsive union.

The Articles of Confederation provided for the establishment of tribunals for the pacific settlement of disputes between states, but made no definite provision for enforcing them. The framers of the Constitution in conferring on the Supreme Court “the judicial power” in “controversies between two or more states”; in vesting in the President “the executive power” and requiring him “to take care that the laws are faithfully executed”; and in giving Congress power to effectuate these powers, evidently considered that the Constitution, as a whole, made adequate provision for the execution of judgments of the Supreme Court rendered against states in cases where such execution was proper; but none of them seems to have thought that the responsibility of the Supreme Court in executing such judgments was exclusive, or was without great limitations.¹⁸

In the great case of *Chisholm vs. State of Georgia*—

¹⁸ James Wilson, speaking on December 7, 1787, in the Pennsylvania Convention called to consider the ratification of the Constitution of the United States, said: “This power [to determine controversies between states] is vested in the present Congress, but they are unable, as I have, already shown, to enforce their decisions. The additional power of carrying their decrees into execution, we find is therefore necessary, and I presume no exception will be taken to it.” *Pennsylvania and the Federal Convention*, by John Bach McMaster and Frederick D. Stone, p. 356.

the first case in which the powers of the Supreme Court were considered, decided in 1793, Chief Justice Jay said:

"In all cases of actions against states or individual citizens, the National Courts are supported in all their legal and constitutional proceedings and judgments by the arm of the executive power; but in cases of actions against the United States, there is no power which the courts can call to their aid. From this distinction important conclusions are deducible, and they place the case of a state, and the case of the United States, in very different points of view."¹⁹

Congress, recognizing the constitutional duty of the President to come to the aid of the Federal Courts when necessary to execute their judgments, effectuated his powers by statute in 1792, and 1795, authorizing him to use the armed forces of the United States for this purpose. This statutory provision, though amended at various times, has always remained on the statute books. In its original form the statute made the President's action dependent upon a written notification received by him from the chief justice or an associate justice of the Supreme Court of the United States; but this limitation was soon repealed, and the question of the interposition of the President was left to be determined by the President, thus relieving the Supreme Court of any odium which the use of military force might involve.

President Madison, writing to Governor Snyder of Pennsylvania on April 13, 1809, acknowledging receipt of a copy of a Pennsylvania statute designed to conform to a judgment of the United States Court, said:

¹⁹ 2 Dallas, 419.

"The Executive is not only unauthorized to prevent the execution of a decree sanctioned by the Supreme Court of the United States, but is especially enjoined by statute to carry into effect any such decree, where opposition may be made to it."²⁰

Chief Justice Taney, in a case decided by him in the United States Circuit Court in 1861, said:

"In exercising the power to 'take care that the laws are faithfully executed,' the President is to take care that they be faithfully carried into execution, as they are expounded and adjudged by the coördinate branch of the government to which that duty is assigned by the Constitution. It is thus made his duty to come to the aid of the judicial authority, if it is resisted by a force too strong to be overcome without the assistance of the executive arm; but in exercising this power he acts in subordination to

²⁰ *Life and Writings of Madison*, Vol. 2, p. 438. The act referred to by President Madison was the Act of May 2, 1792, authorizing the President to call forth the militia "to execute the laws of the Union, suppress insurrections and repel invasions" as modified by the act of February 28, 1795, enacted for the same purpose.

The statutes now in force on this subject are sections 5298 and 5299, U. S. Revised Statutes, Section 5298 contains the substance of the original act of 1792, and in addition authorizes the President, "whenever it shall become impracticable, in the judgment of the President, to enforce, by the ordinary course of judicial proceedings, the laws of the United States within any state or territory, to employ, not only the militia, but also "such parts of the land and naval forces of the United States as he may deem necessary to enforce the faithful execution of the laws of the United States, or to suppress such rebellion."

See also section 3493, which is a part of the chapter relating to civil rights under the fifteenth amendment. By this the President is authorized "to employ such part of the land or naval forces of the United States, or the militia, as may be necessary to aid in the execution of judicial process issued under any of the preceding provisions."

judicial authority, assisting it to execute its process and enforce its judgments."²¹

By "subordination" Chief Justice Taney doubtless meant not subordination in the legal sense, but in the philosophical sense. His idea was evidently that the President in executing the judgments of the Federal Courts was to act promptly and strongly as a military commander, but only for the purpose of executing the judgment in the same manner as the court itself would have done; thus subordinating the power of the United States to those great and fundamental principles of equality and justice which have always influenced courts in executing their judgments.

It seems reasonable to conclude, therefore, that inasmuch as all executive powers exercised by courts have their origin in public policy, and inasmuch as the Executive may properly exercise these powers in cases in which the Courts prefer not to exercise them on grounds of public policy or are unable to exercise them, the Supreme Court may, in controversies between states of which it has jurisdiction, proceed with the execution to any extent that it deems proper, or may refuse to exercise its executive powers altogether; its action being determined by considerations of public policy.²² Its failure to act does

²¹ *Ex parte Merryman*, 17 Federal Cases, 149.

²² Since the above was written, an attempt has been made to institute a new method of procedure in aid of execution of judgments rendered by the Supreme Court against States. On February 5, 1917, the State of Virginia filed in the Supreme Court a bill for a mandamus in aid of execution in the case of Virginia vs. West Virginia, to which case reference has been made above. To this bill all the persons constituting the whole legislative body of West Virginia were made parties defendant. The object of the mandamus proceeding was to compel these defendants in their official capacities, as together con-

not necessarily mean that the judgment will not be executed; for the President is authorized by the Constitution to execute judgments of the United States courts, and is able to do so if furnished by Congress with the requisite force. In executing a judgment of the Supreme Court against a state, the President doubtless has constitutional power to act on his own initiative in aid of the court; but probably in practice the court would, in most cases, certify the judgment to the President, either leaving it wholly to him and to Congress to decide whether to execute it and in what manner, or making recommendations as to the course to be followed.

THE MANNER OF EXERCISING THE POWER

The executive power proceeds in its work of making effective the just commands of the state or nation partly by means of conciliation and partly by means of force.

stituting the legislative body of West Virginia, to levy a tax to pay the judgment. The authorities cited by Virginia, in its brief in support of its application for a rule to show cause, were the cases in which the Supreme Court has sustained the action of the Circuit Courts of the United States in issuing writs of mandamus against taxing officers of municipal corporations, in aid of the execution of the judgments of these courts against these municipal corporations, compelling these officers to levy taxes to pay the judgment, in compliance with the State laws imposing this duty upon the municipal officials. The case of *Louisiana vs. Jumel*, 107 U. S. 711, 727, 728, is particularly relied upon. In the cases above referred to, the United States Courts exercised no compulsion upon the State; they only compelled municipal officers to act as the State, by laws already enacted, had directed them to do. The object of the mandamus proceeding in the Virginia-West Virginia case is to exercise compulsion upon the State, by requiring State officials, assembled as the supreme legislature of the State, to enact new laws. The claim is made by Virginia that the voluntary submission of West Virginia to adjudication of the claim of Virginia against it by the Supreme Court, was a voluntary submission to compulsion by the Supreme Court, as respects its supreme legislative action, for the benefit of Virginia.

The chief executive of a state or nation wields the collective moral influence of its people and their united physical force. It is gradually being perceived that the best and most lasting results can be obtained by inducing voluntary obedience to the commands of the state through conciliation, and that the highest use to which the physical force of the state can be put is to protect the dignity of the state and of its agencies so that they may effectively pursue their conciliative work and bring about just government by the consent of the governed.

If the President were called upon to execute a judgment of the Supreme Court, he would, if he accepted the above principles as the true principles of executive action, first of all satisfy himself that the decision was constitutional and according to law; for it is conceivable (though in the highest degree unlikely) that a judgment even of the Supreme Court might itself be unconstitutional or contrary to law. President Jackson, in his Proclamation of December 11, 1832, warning South Carolina against attempting to nullify the United States tariff act, said: "There are two appeals from an unconstitutional act passed by Congress—one to the judiciary, the other to the people and states." So from any judgment of the Supreme Court which involves considerations of a political nature, there is an appeal to the people and states; and the President, when called upon to execute a judgment of the Supreme Court against a state, would perforce give heed to the judgment of this majestic court of final appeal.

The President would also wish to be advised as to how he might execute the judgment so as not to interfere with

the great principles of the Constitution; for though a judgment of a United States court is undoubtedly a law of the United States which the President is bound to cause to be faithfully executed, it is in the nature of a private law, even when it is a judgment of the Supreme Court against a state, and it must be executed so as to conform to fundamental principles.

But doubtless no President, upon receiving from the Supreme Court a judgment against a state of the Union properly certified, rendered in a case plainly justiciable as being capable of being determined by the principles of law and equity as recognized by our own state and national courts and legislatures, in which the facts had been fully ascertained and the judgment rendered after due hearing and deliberation, would long hesitate to use his moral influence as Chief Executive of the Union and all the physical force of the United States which Congress had placed at his disposal, to compel execution of the judgment.

The provision of the Constitution that "the President shall take care that the laws are faithfully executed" seems generally to have been considered as sufficient authority in itself to enable the President to execute the constitutional powers of the United States whenever resistance is offered to them; but Congress has by many statutes effectuated this power of the President. It would therefore be proper for the President, in case he doubted whether existing statutes gave him sufficient authority to execute a judgment of the Supreme Court against a state, to ask Congress to legislate so as to supply him with the necessary means of exercising moral

influence and so as to place adequate military and naval force at his disposal.

Perhaps also the President has authority, if he deems proper, to call upon Congress to act as a Council of Conciliation in bringing to bear the collective moral influence of the people of the United States on a state against which a judgment has been so rendered. By section 10 of Article I of the Constitution it is provided that "no state shall, without the consent of Congress . . . enter into an agreement or compact with another state." This necessarily implies that any state may, by the consent of Congress, enter into any agreement or compact with another state. The power given to Congress to consent to agreements between states would seem to imply, by reasonable implication, the power in Congress to conciliate between states, in acute cases of dispute, so as to induce them to agree.²² But, though the President might thus perhaps call upon the Congress to act as the Council of Conciliation, it would doubtless be inexpedient to do so in case of any disputes which might lead to a division of Congress on sectional lines. In such cases it would be safer for the President to assume full responsibility and full power, as he has the constitutional right to do; only calling upon Congress to effectuate his powers, if necessary, by legislation.

Inasmuch as the execution by the President of a judgment of the Supreme Court against a state is an act of

²² In the case of *State of Louisiana vs. State of Texas*, 176 U. S., 1, Chief Justice Fuller, delivering the opinion of the court, said (p. 17): "Controversies between them [states of the Union] arising out of public relations and intercourse cannot be settled either by war or diplomacy, though with the consent of Congress, they may be composed by agreement."

the same kind as the execution of an act of Congress, the precedents established by two of our greatest Presidents—Washington and Jackson—in compelling the execution of acts of Congress may properly be considered in this connection. These precedents show that it is essentially the moral and conciliating influence of the United States which the President is to exercise. Though he is to use the military and naval force of the United States to an overwhelming and irresistible extent, he is to use it essentially as his protector and as the protector of the majesty and dignity of the United States while engaged in the work of conciliation.

President Washington had occasion to compel the execution of an act of Congress in 1794. The Excise Act of 1791 was resisted in the four western counties of Pennsylvania. At his request, Congress, passed laws making resistance to the execution of laws of the United States and of legal process of the United States courts a crime, and authorizing the President to use the militia in suppressing conspiracies for resisting these laws or judicial proceedings under them; it being provided that the warrant for the President's action should be a notification by the Chief Justice or an Associate Justice of the Supreme Court of the United States to the effect that such resistance had occurred. Washington, pursuant to the statute, issued a proclamation warning the conspirators and commanding them to obey the laws. He also appointed a Commission of Conciliation to confer with the conspirators. Speaking of the powers of this Commission Washington said, in his Address to Congress of November 19, 1794:

"They were authorized to confer with any bodies of men or individuals. They were instructed to be candid and explicit in stating the sensation which had been excited in the Executive, and his earnest wish to avoid a resort to coercion; to represent, however, that without submission, coercion must be the resort; but to invite them at the same time, to return to the demeanor of faithful citizens, by such accommodations as lay within the sphere of Executive power. Pardon, too, was tendered to them by the Government of the United States . . . upon no other condition than a satisfactory assurance of obedience to the laws."

When the Commission of Conciliation failed and President Washington was called upon in 1794 to take military action to suppress the rebellion, the warrant for his action, as he himself states in his message of November 19, 1794, was a notification, in pursuance of the statute of 1793, by "an Associate Justice of the Supreme Court of the United States that in the Counties of Washington and Allegany, in Pennsylvania, laws of the United States were opposed and the executing thereof obstructed, by combinations too powerful to be suppressed by the ordinary course of judicial proceedings, or by the powers vested in the Marshal of that District." The Associate Justice who signed the notification was James Wilson, whose long and brilliant service, as a member of the Continental Congress, of the Constitutional Convention and of the Supreme Court, had already made him a leading authority in all questions of law and politics. In all that Washington did he had the benefit of the advice of Jefferson, as his Secretary of State, of Hamilton as his Sec-

retary of the Treasury, of Jay as Chief Justice, and of Randolph as Attorney General. Pursuant to the statute of 1793, Washington called out the militia of Pennsylvania, Virginia, Maryland and New Jersey, forming a force of fifteen thousand men, so strong in proportion to the rebels as to be irresistible. He himself took command, and the governors of Virginia, Maryland and New Jersey rode at the head of their divisions. With this overwhelming force in evidence, Washington still persisted in his attempts at persuasion and conciliation. When the rebellion was quelled, partly by persuasion and partly by force, he saw to it that the principal offenders were brought to trial and sentenced; but before he ceased to be President he pardoned all of them."²⁴

President Jackson, in exercising the executive power against the State of South Carolina, in 1833, when South Carolina threatened to nullify the protective tariff law of the United States, sent General Scott into the State with an overwhelming military force supported by a strong naval force, with instructions to keep his overwhelming military and naval power in evidence, but to use every possible effort for conciliation. The result was an amendment of the law which satisfied South Carolina without sacrificing the protective tariff principle.²⁵

President Cleveland, in executing the powers of the United States over the mails and interstate commerce in the State of Illinois, during the railroad strike of 1894, acting under the constitutional provision requiring the President to take care that the laws are faithfully exe-

²⁴ See *History of the United States* by Bryant and May, vol. 4, pp. 118-121.

²⁵ See *History of the United States* by Bryant and May, vol. 4, pp. 306-311.

cuted and under the existing statutes authorizing him to use the armed forces for this purpose, used a part of the army of the United States. His action was approved by resolution of both Houses of Congress and was held constitutional by the United States Supreme Court in a test case afterwards brought.²⁸ His action has been criticized on the ground that it was wholly repressive, and not directed towards conciliation; but it is questionable whether the resistance to the exercise by the United States of its constitutional powers was not so passionate and unreasonable that conciliation was impossible and the only course open was one of mere repression. However this may be, the precedents established by Washington and Jackson seem clearly to show that, though force—overwhelming and irresistible, since only by such force can the result be produced with the minimum of war—is to be used by the United States, against opposition to its just and lawful action; nevertheless, in all cases where the opposition is based on reasonable grounds, this force is to be used only in aid of its conciliative influence. The failure of a State of the Union to conform to a judgment against it rendered by the Supreme Court would certainly be based on some reasonable ground, and if the United States, acting through the President, were called upon to execute such a judgment, it seems clear that every effort of every department of the Government should be directed towards accomplishing the result by

²⁸ See *The Government and the Chicago Strike*, by Grover Cleveland; Address of Hon. Thomas M. Cooley, as President of the American Bar Association, in the *Reports of the American Bar Association for 1894*, p. 233; *Congressional Record*, Senate proceedings for July 11, 1894; House proceedings for July 16, 1894. See also *In re Debs*, 158 U. S., 564.

conciliation; though prudence and policy would dictate the use of overwhelming and irresistible military and naval forces, to maintain the dignity and majesty of the United States while engaged in its conciliative efforts.

It is natural and proper that the Supreme Court, in controversies between States, looking forward to the difficulties in executing the judgment and the possibilities of civil war which every judgment against a State involves, should itself act, so far as possible, as a tribunal of judicative conciliation; seeking to induce litigating States to settle their dispute by agreement, and, when this proves impossible, appealing to those motives which should induce States of a Union to accept the lawful decrees of the tribunal appointed to adjudge their controversies.

In the case of *State of Virginia vs. State of West Virginia*, the Supreme Court has taken a decided step in this direction. In its opinion in that case, the Court, speaking by Justice Holmes, said:

"The case is to be considered in the untechnical spirit proper for dealing with a quasi-international controversy, remembering that there is no municipal code governing the matter, and that this Court may be called on to adjust differences that cannot be dealt with by Congress or disposed of by the Legislature of either State alone. . . .

"As this is no ordinary commercial suit, but, as we have said, a quasi-international difference referred to the Court in reliance upon the honor and constitutional obligations of the States concerned rather than upon ordinary remedies, we think it best at this stage to go no

farther, but to await the effect of a conference between the parties, which, whatever the outcome, must take place. . . . This case is one that calls for forbearance upon both sides. Great States have a temper superior to that of private litigants, and it is to be hoped that enough has been decided for patriotism, the fraternity of the Union, and mutual consideration, to bring it to an end."²⁷

The Union has existed for one hundred and twenty-seven years since the Supreme Court was originally endowed with jurisdiction in controversies between States. Some of our States are thousands of miles distant from each other, and all are diverse from each other in climate, in racial composition, in tradition, and in their social and economic interests. Though the jurisdiction of the Court was not largely resorted to prior to the Civil War—doubtless on account of the acute nature of all questions relating to States' rights growing out of the dispute over the existence and extension of slavery—it has been used with increasing frequency since that time. Never yet, however, has it been necessary to compel the execution of a judgment against a State, rendered by the Supreme Court in the exercise of its original jurisdiction. The judgment in the Dred Scott case alone, of all the judgments affecting States' rights and States' interests rendered by the Supreme Court in the exercise of its appellate jurisdiction, has met with State opposition. The issues of the Dred Scott case are forever dead, and are buried under constitutional amendments. The confidence of the people of the

²⁷ *State of Virginia vs. State of West Virginia*, 220 U. S., 1, 27, 36.

United States in its highest Court is supreme. They recognize their responsibility in upholding it in its unique position as the basis on which the whole fabric of our institutions rests. The States know that the Court will do justice without fear or favor in every case, whether of private or public interest. They feel a pride in preserving the full power and dignity of the great tribunal before which they appear as before an international court of justice. They are devoted to our Union. It is therefore but natural that decisions of the Court both in controversies between States and in cases affecting States' rights, should have been voluntarily accepted; and it is but reasonable to hope and expect that no compulsion will ever be necessary in these quasi-international controversies.

THE PRESIDING OFFICER: Mr. Frederic D. McKenney, in view of the fact that so many of the cases which he proposed to cite have already been instanced, asks that he be excused this evening. He will take the philosophy of his paper and use that for our publication.

The next speaker is Mr. Jackson H. Ralston.

MR. RALSTON: Mr. President, Ladies and Gentlemen, there are two questions which seem to be assigned to me, as well as to one or two of the other speakers. I shall speak more at length upon one of them. The other has been so admirably covered by the paper delivered by Professor Minor that I am happy to say that I feel entirely relieved from making more than a passing comment.

HOW DOES THE SUPREME COURT ENDEAVOR
TO OBTAIN PRESENCE OF DEFENDANT
STATE? CAN THE SUPREME COURT OR CAN
THE GOVERNMENT UNDER OUR SYSTEM
COMPEL APPEARANCE OF DEFENDANT
STATE?

JACKSON H. RALSTON

I have been asked to make some observations with regard to certain questions submitted this evening for the consideration of this society. In beginning, it has seemed to me proper to sketch briefly the immediate antecedents leading up to the jurisdiction of the Supreme Court over controversies between States.

The constitutional provision giving the Supreme Court of the United States jurisdiction over controversies between States finds its origin in principle in the Articles of Confederation of 1777, which in Article 9, said: "The United States in Congress assembled shall also be the last resort on appeal in all disputes and differences now subsisting or that hereafter may arise between two or more States concerning boundary, jurisdiction, or any cause whatever." The Article further provides for the presentation to Congress of a petition stating the matter in question, praying for a hearing, notice to be given by order of Congress to the other States in difference, and a day assigned for the appearance of the parties by their lawful agents, who shall then be directed to appoint by joint consent commissioners or judges to constitute a Court, and in the event of disagreement, Congress to name three persons out of each of the United States from

which each party should alternately strike out one, the petitioners beginning, until the number should be reduced to thirteen, and from this number not less than seven or more than nine names, as Congress should direct, should, in the presence of Congress, be drawn out by lot, and the persons whose names were finally drawn or any five of them should be commissioners or judges to determine the controversy. Further provisions were made for the selection of judges in the event that a party should neglect to attend without sufficient reason, or refuse to strike out.

Jefferson discusses this provision of the Confederation, and, referring to settlement by Congress of disputes between States, (Works, vol. 5, page 16, Ford's Edition) remarks: "It has been often said that the decisions of Congress are impotent because the Confederation provides no compulsory power. But when two or more nations enter into compact, it is not usual for them to say what shall be done to the party who infringes it. Decency forbids this, and it is as unnecessary as indecent, because the right of compulsion naturally results to the party injured by the breach. When any one State in the American Union refuses obedience to the Confederation by which they have bound themselves, the rest have a natural right to compel it to obedience."

The general subject of the right of the Supreme Court over controversies between States as finally embodied in the Constitution appears to have received little, if any, discussion in the Constitutional Convention of 1787, this, doubtless, for the reason that the Articles of Confederation had made the general idea of judicial settlement familiar to the public mind. When we turn to the *Fed-*

eralist we find in letter LXXX, supposed to have been written by Hamilton, that the subject is dismissed in two brief paragraphs, in the course of which it is said: "The power of determining causes between two States, between one State and the citizens of another, and between the citizens of different States, is, perhaps, not less essential to the peace of the Union than that which has been just examined. History gives us a horrid picture of the dissensions and private wars which distracted and desolated Germany prior to the institution of the Imperial Chamber, by Maximilian, toward the close of the fifteenth century, and informs us, at the same time, of the vast influence of that institution in appeasing the disorders and establishing the tranquility of the Empire. This was a court invested with authority to decide finally all differences among the members of the Germanic body.

"A method of terminating territorial disputes between the States, under the authority of the federal head, was not unattended to, even in the imperfect system by which they had been hitherto held together; but there are many other sources, beside interfering claims of boundary, from which bickerings and animosities may spring up among the members of the Union. To some of these we have been witnesses in the course of our past experience. . . . Whatever practices may have a tendency to disturb the harmony between the States, are proper objects of federal superintendence and control."

Very speedily after the adoption of the Constitution the general provision we are discussing received the attention of the Supreme Court. In 1793, in the case of *Chisholm's Executors vs. Georgia*, the matter of service

of process upon a State (although the suit was by a private individual) was given consideration, and the Supreme Court decided (2 Dallas, 419) that service on the Governor and Attorney-General of a State was sufficient.

Justice Wilson, who had been himself a member of the Constitutional Convention, took part in the decision of this case and as relating to the general subject-matter in which the Society is interested, it seems well to call attention to one or two features of his decision. He says: "By a State, I mean a complete body of free persons united together for their common benefit, to enjoy peaceably what is their own, and to do justice to others. It is an artificial person, it has its affairs and its interests; it has its rules; it has its rights; and it has its obligations. . . . In all our contemplations, however, concerning this feigned and artificial person, we should never forget, that, in truth and nature, those, who think and speak and act are men.

"Is the foregoing description of a State a true description? It will not be questioned but it is. Is there any part of this description, which intimates, in the remotest manner, that a State any more than the men who compose it, ought not to do justice and fulfill engagements? It will not be pretended that there is. If justice is not done, if engagements are not fulfilled, is it, upon general principles of right, less proper in the case of a great number than in the case of an individual to secure, by compulsion, that which will not be voluntarily performed?"

In the case of *Grayson vs. Virginia* (3 Dallas, p. 320), the practice already recognized as proper was formulated

into a general rule of Court as follows: "Ordered that when process at common law, or equity, shall issue against a State, it shall be served upon the Governor, or Chief Executive Magistrate, and the Attorney-General of such State."

We have not answered the question as to the power of the Supreme Court to compel the appearance of a State. If we understand this question to be predicated upon the power of the Court to insist upon the physical presence of the State in the person of appropriate representatives, no answer being filed, and no step taken demanding individual initiative, it seems that our response must be that no such power exists. If we understand the query to be whether the Supreme Court has power, a State having summoned and failed to appear, to declare a default and to proceed as if the State were before it through its proper representatives, then our answer will be that such power exists in the Supreme Court. The existence of this power seems incidental to the proper exercise of its jurisdiction under the Constitution. In other words, if the Supreme Court has jurisdiction over controversies between States, it certainly has jurisdiction to do those things which are ordinarily incidental to the determination of issues between private parties. One of these things recognized in all Courts of justice is the declaration of default.

Naturally when an important political body as is a State is the party concerned, and when to a degree governmental agencies are thereby involved, a Court will be exceedingly slow about the declaration of a default, and this was demonstrated in the case of Chisholm's Execu-

tors *vs.* Georgia. While the case to which we are now referring was that of a private individual against a State, a sort of suit which must not be brought today, nevertheless for the purpose of the present inquiry the case is a precedent, as is also that of *Huger vs. South Carolina* (3 Dallas, p. 359). In the latter case, the service of the subpoena being proven, it was held that the complainant was entitled to proceed *ex parte* and he was accordingly allowed to take out commissions to take testimony.

This Society is justified, taking a long look into the future, in believing that the world will some day discover that juridically there is no impassable difference between the situation of American States and of independent nations. We may, therefore, believe that just as the American Colonies worked out a scheme of administrative and judicial union insuring peace between them, so the nations of the earth may sometime be able to forget all false ideas of sovereignty, all arrogance of size, wealth or assumed culture, and submit themselves to regular judicial processes.

THE PRESIDING OFFICER: The last speaker is the author of this very interesting program at this year's sessions. It gives me pleasure to present the "Pillar of the Society."

ADDRESS OF DR. JAMES BROWN SCOTT

Mr. Chairman, ladies and gentlemen, if the Society in any way represents the "Pillar "as it presents itself before you tonight, it is in a bad way. I really should not be here, and I should not attempt to address you upon this subject because, as you may observe, those

of you who have heard me speak on former occasions, this voice, which I should like to consider as silvery (which has never been so called) is not really in a condition to make itself heard and to bear the little message which I had in mind to bring to you tonight.

However, instead of reading the paper which I prepared and which I cannot very well do, I shall make a series of general observations more or less relevant to the subject of tonight's proceedings, and especially of a kind to follow the remarks of the last speaker.

He went into the history of the origin and formation of the Supreme Court in order to show that it might be properly considered as a model for the Society of Nations. He showed how under the Ninth Article of the Confederacy Congress was to be the judge in last resort of all disputes between the states, not disputes of any particular category but of any and every dispute which might arise between the states then constituting the American Union.

He might have said, and Mr. Justice Riddell will no doubt say tomorrow, that the model for this was the Judicial Committee of the King in Council, the Judicial Committee, as it was called, before which petitions were laid, and in appropriate cases referred to judicial decision.

For the King in Council our ancestors created the President and Congress. What was more natural than to follow the old procedure with which they were familiar and to try it in this new country of ours under the new conditions which however had sprung out of the old. They proceeded from the unknown, I may say, to the known, but as these judicial tribunals, or temporary

tribunals, formed under the Ninth Article, did not appear attractive to the states, there was only one controversy actually determined by this procedure, and only in three cases was it constituted for the trial of cases, which; however, were settled out of court.

The framers of the Constitution in convention in Philadelphia in 1787 decided to create a tribunal which should be ready, in existence, to receive disputes between states when and as they should arise; to decide them in accordance with the principles of justice known to the members of the Court and to the judges of the Court, and to practitioners before it.

However, when the Committee of Detail reported a plan of a constitution the Ninth Article was conserved, and instead of the Congress as a whole, the Upper House, the Second House it was then called, the Senate, was the body designated in which the jurisdiction should be exercised between states, the theory being that the Second House, or the Senate, represented the states, and therefore the states themselves either should pass upon disputes between states or they should form a temporary tribunal, as their agent, just as the King in Council either formed a temporary tribunal or referred a dispute of a legal nature to an existing judicial tribunal.

But when that draft was introduced into the convention and considered by its members, Mr. John Rutledge, of South Carolina, Chairman of the Committee of Detail, said, "No, we are now to have a court," and Mr. James Wilson, whose great authority has been invoked tonight, stated, "Yes, and the judicial is the better remedy."

The result of it was that the clauses of the Ninth Article

of the Confederacy, relating to jurisdiction, were transferred to the new constitution, and the Supreme Court was vested with the jurisdiction which the Congress had previously had and possessed the rights of trying and settling the disputes which the temporary tribunal would have possessed or did possess under the Confederacy, and would have possessed under the Constitution if that method had been continued.

In order to draw the analogy a little closer, which Mr. Ralston suggested in the end, the Supreme Court is a fit subject of imitation for the nations composing what we loosely and roughly call the Society of Nations, because when the states, twelve in number, that chose to be represented by their Delegates in Philadelphia, met and considered how they could form a more perfect form of Union (for that under the Articles of Confederation had been far from perfect), they met as sovereign states.

The Second Article of the Articles of Confederation expressly says that the states of this Union, or the Confederacy, are sovereign, free and independent, and therefore, appearing as they did by their delegates, representing the states and voting as states, not as individual delegates, the Convention of 1787, which we look at from the national or the constitutional standpoint, can properly be viewed from the standpoint of a conference, or an international conference, of the twelve states of the then thirteen that chose to send delegates to discuss in conference the form of a more perfect union, and to agree upon a method of settling the disputes which were sure to arise between them in such a way as not to disturb the peace, the order and the quiet of the states in controversy, as well as the states forming this more perfect union.

The great preoccupation of that convention (I should like to call it for present purposes a conference) was to reconcile on the one hand a strong centralized government which should look after the things and the interests which the states had in common, and which should represent the states abroad taking charge of their international relations, with the existence of the states, on the other hand, as political entities.

The great controversy in that conference or convention was as to the existence of those states and as to the means by which that existence should be safeguarded. It was proposed in the Virginia plan, prepared by Madison and laid before the convention by Governor Randolph of Virginia, to form a national legislature to be composed of two houses, the first to consist of members elected by the people within the states upon the basis of population, and that the second house, today called the Senate, should be elected by the members of the first house, so that the large states would have an overwhelming representation in the first house, and by means of their superiority or majority in the first house they would have a controlling influence in the second, with the result that the small states would simply have the rights and the liberties or the privileges which the large states might choose to leave to them.

That was a pleasing vista to the States of Virginia, Pennsylvania and Massachusetts, then considered the large states. It was also a pleasing horizon to the states not then large, but with large hopes and large possibilities, such as North Carolina and Georgia, which states possessed large and indefinite claims of land towards the

Mississippi. They therefore joined their forces with the larger states. But the smaller ones were not content to enter into this more perfect union without some guarantee that the existence assured to them by the looser union should be maintained.

Therefore, as the result of very much debate and controversy a compromise was reached. As usual, extreme claims were put forward by each side, the large states standing for the plan which I have explained to you, the smaller states insisting that there should be a Congress of one chamber the members of which should be elected by the states, thus perpetuating the method of the confederacy in that regard. The result was a compromise, by the terms of which there should be two houses, the lower one elected by the people of the states, and based upon a proportion of the population forming those states, and on the other hand a second house in which the states as such should be represented as states by an equal number of delegates to it, or Senators.

In the course of the debate Mr. Madison asked the Representative from Delaware if it was fair that the State of Virginia, sixteen times larger in population than Delaware, should have only an equal voice with Delaware; or, looking at it from the other standpoint, if Delaware, sixteen times less populous, should have an equal voice with Virginia, to which Mr. John Dickson, of Delaware, replied, "No, it was not just, but it was safe."

The result of it was that by means of this controversy the union which they called the more perfect union, and which has proved itself to be more perfect, was formed; the states of that union preserved against aggression from

the general Government by having an equality of representation in the upper house, and this equality of representation was further safeguarded by the article concerning amendments to the Constitution, which provides that the equality of representation of the states in the Senate shall never be varied by any amendment which shall be passed.

If we turn to the Preamble of the Peaceable Settlement Convention adopted by the First Hague Conference and confirmed by the second, you will find the statement that it is desirable, the powers expressing themselves as desirous, to form a court, as they say, of arbitration, acceptable to all, in the midst of the independent states forming the Society of Nations. That is just exactly what the framers of the Constitution did. They created the Government of the United States as the agent of the states. They preserved the states intact with an equality of representation. They endowed the Government, as their agent, with certain enumerated rights, and such other rights as sprung from necessary implication, and they left with the states all other rights not specifically granted, or powers specifically granted, to the Government or which would be granted by necessary implication, leaving to the states the exercise, or rather reserving to the states, for that is the word, the exercise of all rights not so granted.

And in order that there might be no doubt whatever upon that, among the first amendments proposed by the states, and by Congress submitted to conventions within the states, in the first session of the first Congress, meeting under the Constitution, an amendment was

unanimously passed by the states reserving to the states all powers which had not been granted to the Government or which had not been forbidden to the states, reserving them to the states and to the people thereof.

So that within this Union, state faces state as the equal of state, whether the state be large or small, and within the sphere of undelegated power the states exercise the sovereignty which they reserved.

Why was it necessary for them to form this Court? Because having expressly given up the right to negotiate between themselves or among themselves, and to settle disputes that might arise between them by the process of diplomacy, and having renounced the right to go to war one with another, it was necessary that there should be some agency wedged in between diplomacy on the one hand and war on the other, as diplomacy and war were then, as unfortunately now, the methods, and apparently the only methods, of settling disputes between nations.

What makes the Supreme Court so persuasive of an international judiciary is that the delegates of the states in conference, created (as Mr. Justice Baldwin states in the case of Rhode Island versus Massachusetts, which has been referred to here tonight) the Supreme Court as the agency of the states, not something superimposed upon the states, but the creation of the states, and therefore the agency of the states in the matter of justice, in which the states agree to sue states, and in which they permitted themselves (agreed in advance) to be sued in certain categories of cases.

And what are those categories? Two kinds. The

judicial power of the United States is declared to extend to all cases of law and equity between two or more states, or to which the United States and a state shall be a party. The framers of the Constitution created three departments, the Legislative, the Executive, and the Judiciary. The first two may be considered political departments, the department that makes the law, the Legislative, and the department which executes that law when made, to-wit, the Executive. The third department is the Judiciary, to declare what that law is in appropriate cases; to declare the meaning of that law which it does not make but which has been made by the political department, to interpret it and to apply it so that in appropriate cases it may be executed by the Executive, the other political branch.

The Supreme Court of the United States on taking jurisdiction must convince itself that the suit is a suit between states. It must decide whether or not the plaintiff appearing before it falls within the definition of a state. If it be a foreign nation, that is determined by the political department of the government, and the Supreme Court follows it. If it be a question of the state of the Union it is likewise a political question and the Supreme Court follows the determination of the political department. But if a state lends itself to its citizens to bring suit, the question arises whether it is a suit between the states, whether the plaintiff is a state, whether therefore it has a right to find its relief in the Supreme Court of the United States.

And if, again, it be an individual that brings a suit in the Supreme Court, will it be taken jurisdiction of?

It may be taken jurisdiction of, but not since the Eleventh Amendment, if the defendant be a state. Therefore it is necessary for the Supreme Court to pass upon the question whether in reality it be a state that is being sued, or whether it be a person who represents the state in his official capacity. So that in fact, although not in name, the suit is against a state of the American Union.

Again, it is for the Court to determine whether or not this suit is justiciable, to use the common expression, whether or not the suit comes in law or in equity, because it is only in law or in equity that the Supreme Court takes jurisdiction in suits between states. These are justiciable questions. The Supreme Court in a long series of cases has passed upon this, and if the nations of the world wish to form this international tribunal, and vest it with the power to pass upon and decide justiciable questions arising between states or nations, they have at their disposal the experience of the Supreme Court running over a century and more, which has always been forced to pass upon the questions of the justiciable nature of the suit which is brought before it, because if it be a political question it cannot take jurisdiction, whereas it may take jurisdiction if it be a justiciable question, or, in the language of the Constitution, if it involves law or equity.

There have been tried in the Supreme Court some seventy odd cases between state and state; and, more wonderful still, on three well known separate occasions the United States, availing itself of the jurisdictional clause of the Constitution in the matter of the Supreme Court, has filed its original bill in equity against a state of the American Union. In the earlier cases the question

of jurisdiction, Mr. Justice Harlan tells us, was not overlooked, but it was not questioned, it was not examined, it was not contested; whereas, in the leading case of the United States versus Texas, decided in the nineties, the question of jurisdiction was contested.

The matter in dispute was whether the County of Greer, which figured on the map of Texas was in reality territory originally belonging to Texas, or whether it rightly belonged to the United States. The United States by its Attorney-General filed its bill in the Supreme Court of the United States in equity against the State of Texas, which had been sovereign at one time, and whose sovereignty had been recognized by the United States, and which had been admitted on an equality with the other states, asking that the Supreme Court determine whether Greer County belonged as of right to the United States, or belonged to Texas, and for such other relief as to equity shall seem meet and proper.

So that we have not created merely a tribunal between the states for the decision of disputes arising between them of a justiciable nature, and in which the states consented in advance to be sued, but we have created an instrumentality in which the agent of the states, to-wit, the Government of the United States, which is clearly a sovereign nation, can appear, and in which it has appeared, setting forth its rights to litigate the dispute instead of considering it a political question, as would otherwise be considered, or instead of attempting the use of force, which would be only too common in countries where a tribunal of this kind does not exist.

And finally, while I cannot say that a foreign nation

can file its bill in the Supreme Court of the United States against a state of the American Union, as that has not yet been done, and there is no precedent for it, a lawyer considered by many to have been, as a lawyer, the most keen and subtle who ever adorned the Supreme Court of the United States, Mr. Justice Curtis, in an opinion rendered in the year 1860, after he had ceased to be a member of the Supreme Court, informed his client, the great Dominion to the north of us, that Great Britain might appear in behalf of its subjects and file its bill in the Supreme Court of the United States against the State of New York.

So that if that be true the framers of the Constitution did indeed build better than they knew, for between the breakdown of diplomacy and the resort to arms they created an instrumentality in the midst of states equal, and which in the matter of justice consider themselves still as sovereign, that model for the Society of Nations to form a Court of Justice, the organ of the Society, free and easy of access, open to all, in the midst of the independent powers forming the Society of Nations.

In conclusion I beg to read you the first paragraph which I had meant to be the opening one, cut from the newspaper the other day, without comment, in the actual ordinary course, with nothing in it to attract the reader or to suggest that the reader was witnessing a very remarkable performance:

"No. —. Original. State of North Dakota, complainant, vs. the State of Minnesota. Action for leave to file bill of complaint granted and process ordered to issue, returnable on the first Monday of March next.

"No. ——. Original. State of South Dakota, complainant, vs. State of Minnesota. Action for leave to file bill of complaint granted and process ordered to issue, returnable on the first Monday of March next.

"No. ——. Original. State of Minnesota, complainant, vs. the State of Wisconsin. Action for leave to file a bill of complaint granted and process ordered to issue, returnable on the first Monday of March next."

Mr. Chairman, ladies and gentlemen, what thirteen states in their wit and wisdom created in 1787, and what forty-eight states today, equal and as they claim sovereign in matter of justice, can do, have done, may we not hope that the Society of Nations, composed of states equal and likewise claiming to be sovereign, may do, by establishing as the organ of this Society of Nations, become conscious of its existence, a court of justice which shall entertain disputes between nations when and as they arise, of a justiciable nature or sounding in law and equity; and if the judgments of the Supreme Court of the United States, composed of nine jurists of prominence, have been so clear, reasonable and acceptable that although questioned at first they are now considered tantamount to an executed judgment, that they are almost self-executory, may we not hope that the Society of Nations, seeing what these states have done, enriched by the experience of these states extending over a century and more, when they recognize the futility of the appeal to force, may consent as the United States has done to appear before this tribunal, and as the states of the American Union do, appear before a court of justice and litigate their cases as man and man without a resort to force, and with the appeal to reason, which in the long run cannot be in vain.

THE PRESIDING OFFICER: That concludes the program for this evening. The Conference stands adjourned to meet at ten o'clock in the morning, when Mr. Taft will be the first speaker.

(Thereupon at 10.30 o'clock p.m., the Conference adjourned, to meet tomorrow morning, Saturday, December 9, at ten o'clock.)

SECOND SESSION

SATURDAY, DECEMBER 9, 1916, 10 O'CLOCK A.M.

Dr. James Brown Scott, Presiding Officer

THE PRESIDING OFFICER: The first business of the morning will be to call upon the Committee on Nominations to present its report.

MR. WHEELER: Mr. Chairman, Ladies and Gentlemen, the Committee have given time and thought to their deliberations. There is a gentleman whose name I will not mention whom the Committee desire to nominate for vice-president, but his consent has not yet been secured. Therefore on behalf of the Committee, I ask the consent of the Chair, that the report be deferred until a later period.

While I am on my feet I ask permission to say a few words in regard to the very important subjects that we have under discussion, before we pass to the next order of business.

THE PRESIDING OFFICER: Yes, Mr. Wheeler.

REMARKS OF MR. EVERETT P. WHEELER

A statement was made in the first paper that the decision in *Marbury vs. Madison*, in which the Supreme Court declared the power of that Court to decide that an act of Congress was in violation of the Constitution which is the fundamental law, sprung, as it were, from the brain of

the Chief Justice. That is a statement that is often made and it was coupled with the quotation from a foreign writer that that power was unique in civilized countries.

That statement was made, and entered more or less into the political campaign of four years ago. Our New York State Bar Association thought it necessary to appoint a committee to have it thoroughly investigated. That committee is just making its third report, and our Chairman, Mr. Henry A. Forster, has made a very careful historical study.

The three reports of the committee which were in the main drawn by him, although we have consulted together about them, are an important contribution to legal literature. They show there very clearly, by the citation of many authorities, that at the time of the Revolution many of the colonists, who disputed the validity of the Stamp Act, and of other acts of the British Parliament, based their opposition largely upon the statement made by Lord Chief Justice Coke in the time of the First James, that the common law doth control acts of Parliament and adjudges them void when against common right and reason. A law confiscating a man's property without hearing and without compensation would fall within this condemnation. It was true that the Parliament at a later period, claimed to be omnipotent as Blackstone tells us and this claim was sustained. (1 Kent Comm. 447, 448.) But the colonists argued, many of them, that they could maintain the earlier doctrine, and that Chief Justice Coke was better authority than Sir William Blackstone. I refer to this as a historic fact which shows what was in the mind of the framers of the Constitution.

Accordingly there is a case in Massachusetts where the Supreme Court of that State in 1786 before the adoption of the Constitution of the United States declared void an act of the Legislature of Massachusetts. The Court in Rhode Island in the same year passed the same judgment upon an act of the Legislature of that State. In short, there are numerous instances in our earlier history where the sense of our people was manifested that the Court should have power, and did have power, to consider whether an act of the Legislature was in violation of the fundamental law, and to hold that it was void if the act transgressed that law.

Then came the Constitution with its provision (Article VI) that this "Constitution and the laws of the United States which shall be made in pursuance thereof shall be the supreme law of the land, and the judges in every State shall be bound thereby, anything in the Constitution or laws of any State to the contrary notwithstanding."

Before *Marbury vs. Madison*, judges and writers on the subject of the Constitution maintained that this clause gave to the Court that was to hear a case the right to consider which of the two should control, the great fundamental law that the people had adopted and which it had declared to be supreme, or the statute which a temporary majority in the Legislature might think was proper to enact.

The Bar Association Committee were also able to show that that same principle has been recognized in countries other than our own. In the last report there are more than a hundred cases cited in which, during the last

fifty years, the British Privy Council and the highest court of the various commonwealths, the Dominion of Canada, the Commonwealth of Australasia, have maintained the same principle and have set aside acts of their local parliaments, on the ground that they were *ultra vires* contrary to the fundamental law of these commonwealths.

The statement is often made that the decision of the Supreme Court in *Marbury vs. Madison* was a new thing. It has been called by some writers a usurpation, and so it seems to me important to get the authorities on our record of this proceeding, since the other statement had been made. I ask permission when the record is made up, to add a note giving a reference to these authorities, that I am sure will be interesting to all of you, for they have been the result of great research; they are not collected anywhere else, and I think it would be very informing to those that read our valuable proceedings to have the collection of them there.

The other point I desire to make is in regard to another paper, which I thought expressed some doubt as to the power of the Supreme Court to enforce its decisions, with the aid of course of the Executive arm of the Government—I dwell upon it for a moment because it seems to me that in forming a world court, to which we are looking forward—it may be a far off event, but I believe that the whole Creation is moving toward it and we shall see it ultimately—I may not see it. I am sure at any rate that some of the younger men here will see it and rejoice in the light.

The point to make in dealing with our own Supreme Court, which we are putting forward in this meeting, as

the precedent, is this: When the case of *McCulloch vs. Maryland* was argued, when Webster made his great argument there, which is followed closely by the Lord Chief Justice, as you will find, when you compare the two, this fundamental principle was established forever in our history. It has been disputed sometimes, but it has always been victorious. When a power is given in the Constitution, all the means appropriate to the exercise of that power, and within the reasonable discretion of Congress, are given also.

To use the language of Chief Justice Marshall (*McCulloch vs. Maryland*, 4 Wheaton, 316, 409): "The government which has a right to do an act, and has imposed on it the duty of performing that act, must, according to the dictates of reason, be allowed to select the means."

On that ground that case sustained the constitutionality of the Bank of the United States. We know that Andrew Jackson took a different view. We know that he vetoed the act renewing the bank charter. But we know that when our Civil War came, a national banking system sprung into existence, and that under the present Federal Reserve system its usefulness has been greatly extended. No one thinks for a moment of questioning the power now of Congress to deal with this whole subject according to its reasonable discretion with plenary power.

The original power being granted in the Constitution, all that is necessary or appropriate to give effect to that power is thereby granted. And following out that line of thought which can not well be gainsaid, in view of our decisions since then, and the practice of our Govern-

ment, it is clear that when power is given to the Supreme Court under the Constitution to have jurisdiction, to hear and to decide, that that jurisdiction takes with it all the usual and ordinary powers of a Court, and one of those powers is to execute its judgment. It is made the duty of the Chief Executive, and he is given the power by statute, to employ if necessary the Army and Navy of the United States, to give effect to the laws.

The most notable decision on that point, is in the case of the great railroad strike of 1894. Mr. Cleveland and his Attorney-General, Mr. Olney, caused a bill to be filed in the Chicago District Court to enjoin the leaders of the Brotherhood, or Federation, I think it was called, from interfering with the interstate commerce of the country and the transportation of the mails. That order was made by the Court. The leaders disobeyed it. They were imprisoned. They sought relief from the Supreme Court, and the Supreme Court (*In re Debs*, 158 U. S., 564) laid down this doctrine that is really involved in *McCulloch vs. Maryland*, in the clearest way, in the most positive way. They hold that the President and Congress are charged with the duty of protecting interstate commerce, of protecting the transportation of the mails and of the freight and passenger traffic that are incident to the commerce; that it is the right of the courts to issue their orders of injunction, to protect that commerce, and it is the right and duty of the President to enforce their orders, if necessary. He did, and that was the end of the strike.

I agree that all conciliatory measures should be used. I never would strike first and hear afterwards. I would

give a hearing. I would stretch out the olive branch of peace. But sometimes, alas, the olive branch is trampled under foot, and when it is, the Government is endowed with power, and charged with the duty, of giving full effect to the judgment of the Supreme Court of the United States; and if we do have, as I trust we shall, an international tribunal, I trust it also will be clothed with power to call in the aid of the nations to enforce its decrees.

THE PRESIDING OFFICER: The Chair has just asked Mr. Wheeler if he would have any objection whatever to have these three very valuable reports printed as an appendix to the proceedings; and, as they say in other parts of the English speaking world, out of compliment to our request he has graciously consented that that be done.

MR. WHEELER: Very gladly consented, Mr. Chairman.

THE PRESIDING OFFICER: It is always a difficult thing for a chairman to know his bounds and to live strictly within them. He would like to say just one thing, if he might, and that is that the right to declare an act unconstitutional seems to follow clearly from the doctrine of *ultra vires*. If you have a written constitution it must be interpreted, and the power exercised under it must be in conformity with the grant. Hence it follows that in every country, or at least in the English speaking colonies where constitutions are fundamental acts which have been introduced, the power of the Court to pass upon the right of a governmental branch apparently goes with it.

One further observation. The views of Mr. Wheeler

in regard to *Marbury vs. Madison* seem to be borne out by the discussion in the Constitutional Convention, member after member repeatedly saying that the Court when established would as a matter of fact be obliged to pass upon the constitutionality of an act, and declare any laws void inconsistent with the fundamental charter of the Government. So that historically and legally the point seems to be, I take it, beyond successful contradiction.

Gentlemen, we are not wholly a fair weather society. We are influenced more or less by the weather, but I think it must be a matter of congratulation to us all that notwithstanding the unfavorable conditions we nevertheless have an audience which we will admit, without further proof, is a very select one. A lawyer ought not to mind a small audience, because he usually speaks to twelve good men and true; and we have at least that number. And differing from the lawyer before the Court, the proceedings, which will be incorporated in the volume devoted to this session, will go as far as the mail can carry it.

Let me make two observations to encourage those who come from a great distance to take part in our proceedings, and who naturally would like the words of wisdom that drop from their lips to reach more numerous ears.

Some years ago I happened to visit in Oxford the room of a distinguished judge, Lord Justice Peck, in England, and I found lying on the desk something with which I was very familiar. It was a volume of our proceedings. I asked him how he could account for the presence of the book, and his reply was very simple, and encouraging

as it was simple: that he always put that book in his valise, or an annual report of this Society in his valise, when he went on a trip, because he found matters concerning the international movement and judicial settlement there which he could not find elsewhere. And as Mr. Marburg stated last night in his very timely address, if I may say so, it is a matter of record that the Netherland authorities have stated that the various proceedings of this Society have convinced the Netherland Society of the feasibility—nay, more, the necessity—of judicial proceedings as distinct from arbitral procedure.

Gentlemen, without detaining you further, it is my very great pleasure, and I assure you a very great honor, to introduce the next speaker who honors us with his presence. We have all hoped, I am quite sure I express the opinion of every man present, that he would before this have adorned the Bench of which he is to speak today; and we can not give up the hope, and indeed the expectation, that one day the Honorable William H. Taft, formerly President of the United States, will be a member of this great tribunal which we hold up to the nations as a sure and a safe model. Gentlemen, Mr. Taft.

MR. TAFT: Gentlemen, this subject that I have to approach covers a sufficient field—

THE PRESIDING OFFICER: You have all the morning.

WHAT IS THE FUNCTION OF THE SUPREME
COURT IN THE AMERICAN GOV-
ERNMENT?

WILLIAM HOWARD TAFT

I want to say before I come to the discussion of that subject that I cordially concur in the statement as to the value of the proceedings of this Association, and I say so from personal experience in regard to it. I do not think it makes any difference whether you are talking to three men or to fifteen, if what you get into the printed record is something that is of value, when men have things to do and are looking to see how to do them. And that certainly is the case with respect to the records of this Society. I have them on my shelves, and I frequently refer to them. The speeches are ordinarily made with a knowledge of the subject, dealing with references and with authorities that are of the utmost use in the further discussion of the subjects treated.

I really thought when I came in here that I had stepped back about fifty years when I heard Mr. Wheeler discussing with all his force, and with a certain degree of zeal, as if somebody had opposed it, the idea that the Supreme Court of the United States had the right in litigated cases before it to prefer the Constitution to a statute of Congress, in deciding what law should govern the particular case before it. Certainly I do not think we are going to help matters if we are going back a hundred years to consider principles that, if there is any virtue in authority, have been settled not only by the Supreme Court itself, not only by the acquiescence of

the people of the United States, but by forty-eight other supreme courts that have done the same thing.

Of course with reference to the subject as to whether a written constitution is necessarily to be preferred to a statute, there are differing practices in different countries, but as the chairman has said, the English speaking countries have all concurred in the view that was set forth by Marshall in *Marbury vs. Madison*.

In France they have that anomaly by which the court enforces a law which is admitted to be unconstitutional. It is a law adopted by the French Assembly, and the theory is that the Assembly has the right to construe its own powers conclusively, and therefore the court coming on to enforce the statute enforces it with the knowledge that it is contrary to the fundamental law, but accepts the construction put upon its own powers by the French Assembly. That seems to those of us who have been born and brought up in another atmosphere to be absurd, but whether it be absurd or not, so far as we are concerned, it is absurd.

I think these discussions as to whether the Court has this power, only give an opportunity to a lot of people who do not like decisions of the Supreme Court and do not want a Supreme Court at all, and do not want a constitution, and who ought not to be trusted with a constitution over night, an opportunity to advance certain views solemnly, which really have no weight with men who understand the subject.

I presume that this subject, "What is the Function of the Supreme Court in the American Government," should be treated from the standpoint of our international

relations. Of course, under our theory of government as between the states and the United States, the power with respect to our foreign relations is turned over to the National Government. In domestic matters we have a Congress that attends to strictly Federal matters—that is, it is supposed to—and state legislatures that attend to strictly state matters.

The domestic field with legislative jurisdiction is divided into two parts; one is to be covered by the Congress and the other by the state legislatures. And so with respect to the Executive; the President on the one hand has certain domestic duties, and the governors of the states, and the subordinate executives of the states, because they are hydra-headed, have domestic jurisdiction in respect to the states and state authority.

And so with respect to the Judiciary.

But when it comes to our foreign relations, then everything is exclusively reserved to the Federal branches of the Government. The Executive has the initiative in our foreign relations, and with two-thirds of the Senate makes the binding treaties. The Executive receives ambassadors, which means a great deal more than merely handing out a card-case to take the cards of the ambassador. It means a conduct of the entire correspondence and a representation to the foreign countries of the United States; the President alone does that.

And then Congress has the foreign relations involved in the declaring of war and in the regulation of foreign commerce, and in the regulation of naturalization.

Then with respect to the Federal Court, to that is accorded the exercise of the judicial power that would affect

naturally our foreign relations. The Federal Judiciary was created of course first to secure uniformity in the construction of the Constitution and the laws of the United States. It was thought that necessarily a government of the dignity of the United States, and a nation, should have a court of its own which should pass on its own laws, and finally determine what the construction of those laws should be.

Second, its function is to avoid in a concurrent jurisdiction the local prejudice that might arise from litigation by the citizen of one State, or the subject of a foreign state, with the citizen of the state of the court in which, but for the United States court, the litigation would have to be had.

And the third is to deal with foreign differences.

In the first place it construes the statutes as to foreign commerce.

In the second place it hears controversies in which ambassadors, ministers and consuls are parties.

In the third place it hears suits for and against foreign states. This last is becoming important, since Cuba, under the advice of our friend Coudert, is now suing North Carolina for \$40,000,000 on the reconstruction bonds. Never before so far as I know has a foreign state improved the opportunity presented by the Constitution by which a foreign state may sue one of the states of the United States.

And then in the fourth place the Federal Judiciary entertains suits for and against foreign citizens.

The simple statement that the judicial power of the United States extends to controversies between states

was the solution of a difficulty that presented itself to the framers of the Constitution. They had found that it was necessary under the Articles of Confederation to have some means, some peaceable means, of settling the disputes between states of the Confederation, and so they got up a system of a temporary judiciary, a kind of struck jury, which the Continental Congress was to create every time one state wished to sue another. Each state selected three, the Continental Congress nominated three, and then the opposing parties alternately struck from that thirty-nine names until it reduced the court to five or seven. They had eight or nine litigations begun. Only one was carried through.

Connecticut, anxious to get some of the good farming land in the Susquehanna Valley, with that very generous charter from Charles the Second which gave her a tract of land as wide as the state of Connecticut, running clear out to the South Sea, attempted to appropriate or give title to the land in the Wyoming Valley.

They found to their—I don't know that it was to their surprise—that the principles of non-resistance of those who came with William Penn, did not apply when Connecticut was trying to get land in Pennsylvania. So finally they brought suit, and the suit was heard, forty days at Trenton, before a court constituted as I have suggested. They had the best lawyers argue the case. And then the Court decided it, without reasons, flatly in favor of Connecticut. That commends itself as the practice that might well be followed by some other courts.

At any rate there were no reasons, and that led to

the suspicion that Connecticut had not been altogether defeated even with the apparently categorical answer to the question presented by the lawsuit, because in the very next session after this judgment was entered with the consent of Pennsylvania, her people voting for the acceptance, Connecticut made a grant to the United States of America of all her territory which she owned west of the west line that now divides her from New York, clear to the South Sea, reserving however that tract of land, 120 miles long, as wide as Connecticut, west of the west line of Pennsylvania, which gathered into the coffers of Connecticut the proceeds of the land in now the Western Reserve of Ohio, the part of Ohio that I used to consider the best part in Ohio until they departed from their Republican majority. That arrangement seemed to indicate that there was a conciliatory and perhaps a compromising spirit abroad when the judgment was rendered, followed by this generous gift of Connecticut to the United States of what she did not have, reserving something that she never had before, probably under an arrangement with Pennsylvania.

The provision in the Articles of Confederation contains the statement that such a court should consider boundary disputes and every other question whatsoever arising between the states. It seemed to cover everything. At first in the Constitutional Convention it was suggested that the Senate should form a tribunal to settle controversies between states, but that was departed from, and now the settlement of controversies between states is made a part of the judicial power of the United States, conferred in the simple words, that the judicial

power shall extend among other things "to controversies between states."

That is as wide as the expression "boundary and all other questions whatsoever" that were contained in the Articles of Confederation.

It has in this jurisdiction manifested a very broad and liberal view. It treats itself as an international tribunal, and it abolishes from the litigation all the technical rules that might lead to a judgment without hearing on the merits.

The word "justiciable," in *Hans vs. Louisiana*, in the 134 U. S., used by Mr. Justice Bradley, seems to stick in the throats of a good many people. I have been asked, "What do you mean in that resolution of yours, as to that 'justickable?' " It is a word that almost defines itself, it seems to me. It is a word meaning something capable of being settled in a court of justice. The word was originally used, as I recollect it, first by DeTocqueville; at least that is the earliest instance of its use that I have run across. But it has been used by the Supreme Court very frequently since, first perhaps by Mr. Justice Bradley, and then by Chief Justice Fuller, and then by Mr. Justice Brewer, and by others.

Mr. Justice Bradley points out that there are a number of controversies between states that cannot be settled by courts. One reference is to *Wisconsin vs. Pelican Insurance Company*. That was a case where Wisconsin attempted to enforce a fine imposed by its Insurance Commissioner on a foreign insurance company, for violating its insurance laws through the Supreme Court.

Mr. Justice Gray in announcing the opinion said that under international law one country could not expect another, and could not require another, to enforce its criminal laws. Mr. Justice Gray says in that case:

"This court (the Supreme Court) has declined to compel performance of obligations which if the states had been independent nations could not have been enforced judicially but only through the political departments of their governments."

Mr. Justice Bradley says in *Hans vs. Louisiana* that there are some things made justiciable apparently by custom; certainly the Court considers them made justiciable, not known as such at common law—for example, a controversy between states as to boundary lines and other questions admitting of judicial settlement. Then he goes into a case, *Penn vs. Lord Baltimore*, I think it is, in which he says that even in common law in the practice of the courts in England there was this branch of jurisdiction. He says:

"The establishment of this new branch of jurisdiction seemed to be necessary from the extinguishment of diplomatic relations between the states. All other controversies between a state and another state, or its citizens, which on the settlement principles of public law are not subject of judicial cognizance, this Court has often declined to take jurisdiction."

Then in the case of *Louisiana vs. Texas*, Chief Justice Fuller, meeting a charge by the State of Louisiana that the State of Texas was enforcing its health laws, not for the purpose of promoting the health of the people of Texas, but for the purpose of injuring the business of

Louisiana and thus promoting the business of Texas, said that "In the absence of agreement it may be that a controversy might arise between two states for the determination of which the original jurisdiction of this Court could be invoked. But there must be a direct issue between them, and the subject matter must be susceptible of judicial solution. And it is difficult to conceive of a direct issue between two states in respect of a matter where no effort at accommodation has been made.

"Nor can it be conceded that it is within the judicial function to inquire into the motives of a state legislature in passing a law, or in the chief magistrate of a state in enforcing it in the exercise of his discretion and judgment. Public policy forbids the imputation to consider official action from any other than legitimate motives."

I do not know but that is going pretty far. When you come to hear cases between states, states act by laws as well as by executive action; and if we never presume a wrong motive in enacting a law, or in executive action, we are indulging in a very large presumption, often contrary to fact, and we are taking out of judicial cognizance cases between states on issues which, with respect to the constitutionality of laws passed, have been considered by the Court, such as the questions of motive and effect where the motive was palpable.

The Court has affirmed in a number of cases the right of a state to invoke this jurisdiction and sue another state as *parens patriae*.

In the case of Missouri vs. Illinois it appeared from

the petition of Missouri that in the eastern part of Missouri everybody who drank water in that State was subject to danger of typhoid fever, due to the drainage canal which had been carried down the DesPlaines River and the Illinois River into the Mississippi. And the Court said that Missouri was entitled to sue for her citizens in such a case as that. That treats Missouri as the parent of her people, and as entitled to represent them. That is departing from the technical idea of representation. Missouri is not a trustee in the property sense, but in view of the fact that it is international jurisdiction, which the Court is exercising, it permits the state to assume that relation toward her citizens.

In the same way, in *Kansas vs. Colorado*, where the suit was to enjoin the consumption of water in the Arkansas River by Colorado, so that Kansas in her dry part could not use that water for irrigation, there Kansas appeared on behalf of her farmers, and on behalf of others of her citizens who were interested in the use of the water.

But on the other hand, in the case of *New York and New Hampshire vs. Louisiana*, the Court refused to allow those states to take over for purposes of suit, bonds that had been issued by Louisiana, and sue Louisiana on those bonds as a trustee for her own citizens. There it was thought this was a mere device of those citizens each of whom had a distinct cause of action, to use the name of the State with its consent to evade the Eleventh Amendment which prevents suit by a citizen against a state.

In the suit of Cuba against North Carolina, I understand that the United States has been cited into that

suit, or the Attorney-General has been notified to come into court. This must be because the United States may subsequently be involved in an issue with Cuba as to the action of the Supreme Court. We shall hope for a new light from the Supreme Court in considering that question.

There is difficulty of enforcing judgments in the Supreme Court against a state, just as there is difficulty in enforcing a judgment against a man who has not any property, or has not any property that is available, property that may be exempt under an exemption statute.

I have no doubt the Court is very anxious with reference to the decision and the judgment entered in this West Virginia case. Twelve millions of dollars is a good big sum to pay. And even in such a rich state as West Virginia, you have got to search far to find enough, that under the marshal's sale, would pay it, if it ever came to that. It would be difficult to levy on pieces of property that are used for state purposes, and thus interrupt state government by taking away its instruments.

That completes what I had thought of saying with reference to the function of the Supreme Court.

The Supreme Court offers, in its practice, rules not only on the merits of international law, but rules that ought to be very influential in determining what the course of a permanent international court should be in dealing with the litigation between nations. I have no doubt there has been already emphasized, the difference between a court and an arbitration. The Supreme Court of the United States illustrates that difference. It decides questions according to law. It is not the end of a mediation or negotiation. It is not the climax of a

diplomatic effort to reach some solution that will prevent people from fighting each other. It has the authority to decide questions according to right and justice, and it does. And that is the difference between a court and an arbitration, as arbitrations are generally carried on.

It is not that we dissent from the value of arbitrations and that we are not glad to have cases and difficulties settled by arbitration if that will settle them; but arbitration does not thereby contribute, as courts would, to the definition of principles of international law. Each case growing out of the feeling of the pressure to reach some solution that will prevent war is a compromise, and a compromise does not determine principles of law; that is, unless a compromise is followed by so many other compromises of the same tenor that really the law is changed by practice.

What we are contending for in this Association is a higher ideal than the settlement of disputes by arbitration. There is no reason why we should not contend in that direction, because ultimately we will reach it. By holding clearly out to the public the distinction between the two, without deprecating the use of the less satisfactory, we can make the people ultimately understand what should be the kind of tribunal to settle justiciable questions between nations.

THE PRESIDING OFFICER: I think it ought to be entered on record, gentlemen, that we have before us this morning a very attractive program, and we have a distinguished guest who has come all the way from the great Dominion to the north of us, not merely to tes-

tify his interest in the judicial settlement of disputes that must necessarily arise between any and all countries, but to speak as one of authority upon a precedent for the Supreme Court which this Society of ours is holding up as the model of an international tribunal.

I do not need to introduce Mr. Justice Riddell, because he is a friend of all of us, but in your name I beg to thank him for his presence.

ANOTHER SUPREME COURT

WILLIAM RENWICK RIDDELL

I want to protest in the first place about it being said that I have "come all the way from Canada" in order to speak to you. I can leave Toronto at 5.20 in the afternoon, and I can get here before noon the next day. When I was on the trial bench, very frequently I used to go up to part of the Province of Ontario (from which I come), eleven hundred miles away from Toronto (to Washington cannot be more than five or six hundred miles); I would leave Toronto at noon, and I would arrive at my destination two days thereafter. So, when you talk about "coming all the way," you forget that Canada, as well as Washington, is a place of magnificent distances.

At the first meeting of the Society in 1910, Mr. Alpheus Henry Snow read an interesting paper on the "Development of the American Doctrine of Jurisdiction of Courts over States." Premising by saying that "the American Colonists regarded the Colonies as commonwealths and free states," he went on to state that "they believed that the settlement of disputes between States

composing the English Empire . . . ought to be in charge of a specially constituted tribunal fitted by training to act judicially where the judicial method was applicable;" and he pointed out that that tribunal was the King-in-Council. That tribunal still exists and flourishes in full vigour, and it is that tribunal which I call "Another Supreme Court."

It is not intended here to reiterate what has been so well stated in Mr. Snow's address but rather to supplement it: nor shall I go largely into the history of this tribunal. All who are interested will find its history traced in an address before the Missouri Bar Association in 1909, published in the *American Law Review* for 1910, pp. 161-176.

Confining my remarks in great measure to the present and the recent, the first thing that is to be said is that this "Court" is not a court at all. The Judicial Committee of the Privy Council is simply a committee for special purposes of the Privy Council of the King.

In theory the King is the fountain of all justice throughout his dominions, and from time immemorial he has exercised jurisdiction in his Council which acts in an advisory capacity to the Crown. In theory also every subject has the right to submit his grievances to the King—"to seek the foot of the throne." Petitions of that nature which came before the King were after the development of Parliament referred in most part to Parliament which thus became the chief appellate tribunal. From early in the fourteenth century Receivers and Triers of petitions were appointed to relieve Parliament of clerical and routine work and to aid in the administration of

justice. These were of two classes, one for England and Ireland, the other for the remainder of the King's dominions. The petitions from England and Ireland went to Parliament, the original of the present appeal to the House of Lords, the others to the King in Council. It seems to be fairly certain that it was with appeals from Jersey and Guernsey that the King's Council began its regular exercise of the functions of a Court of Review.

But the Council did not confine its activities to the islands and territories beyond the seas: "it continued from time to time to exercise a kind of extraordinary and corrective jurisdiction to prevent violence, corruption or intimidation, and especially combination and conspiracy to obstruct or prevent the course of justice.

"But still much jealousy continued to be manifested from time to time at the exercise of this extraordinary jurisdiction by the ancient body—salutary and necessary as it in many cases undoubtedly was. At last it was thought proper to give statutory authority to its proceedings and a statute was passed in 1487 (3 Henry 7, c. 1). Before this Act the King's Council sat as a rule in the Star Chamber, and when the legislation came to be passed, it mentioned specifically 'the Court of Star Chamber.' This, as Hallam long ago showed, was a kind of Committee, that is a Judicial Committee, of the King's Privy Council. The Court of Star Chamber (as has been shown by recent investigation of its records, still extant) in many cases acted not as a statutory body at all but under the original Common Law Jurisdiction of the Privy Council; and indeed did not conceive of it-

self as being of statutory origin. Moreover, the Privy Council also continued at times and in certain cases, e.g., in cases of riot, to act outside of the Star Chamber and as the Privy Council had acted before the Statute. Whether the 'Court of Star Chamber' was a Court appears within a few years after the passage of the Act to have been questioned by the Common Law Judges; the great authority of Coke is that the judgment of these judges was 'a sudden opinion.'"

The court fell into disrepute in the Tudor and Stewart times and it was abolished in 1640 by the Statute 16 Car. 1, c. 10—but this Statute in no way affected the existing right and duty of the Council to hear appeals from English territory to which the Common Law writ did not run.

In 1667 a Committee of the Privy Council was formed to hear such appeals, a Judicial Committee, and such a Committee has continued to the present day. There has been legislation more than once but no change has been made in the status of the Judicial Committee. The members of the Committee are gentlemen who are members of the King's Privy Council and who are associated together for the purpose of listening to petitions from a private individual, a corporation, a Province, complaining of wrong. They are to advise His Majesty what he should do in the matter, but they are not Judges. They have of course the same power as any Court to rectify mistakes which have crept in by misprision or otherwise in embodying their judgment: *Rajundernarain vs. Sing* (1836) 7 Moore P. C. 117.

This body of gentlemen sits in a dull old room in a

building on the north side of Downing Street, Westminster, round a table in the middle of the room. They are not dressed as Judges with gowns, bands and wigs, but in the ordinary costume of an English gentleman. The number sitting to hear appeals is not fixed—I have seen four and I have seen seven (three exclusive of the President form a quorum.) One end of the room is raised—here are desks with pens (the villainous quill, of course) and ink for the Bar and the Solicitor. The barristers are all clothed in the conventional English style, black clothes, gown, wig and white bands, and when addressing Their Lordships, the Barrister stands opposite the end of the table at which the members of the Committee are sitting. Every English (and Canadian) Judge is “Your Lordship,” “My Lord,” but the Committee are addressed as “Your Lordships” not because the members are Judges, for they are not, but because they are members of the Privy Council.

But there is a more important consequence than that of clothes (*pace* Herr Teufelsdröckh) following from the fact that the Committee is not a Court. The House of Lords is a Court and as a Court is bound by its own previous decisions; but the Judicial Committee is not so bound—it is not bound by any decision. Of course, its former decisions are treated with proper respect but the case is not without example that they have not been followed.

That reminds me of an incident that occurred when I was myself arguing before the Privy Council, and I mentioned a certain proposition of law. Lord Macnaghten said, “Where do you get that?” I replied, “I took that

from your Lordship's remarks in the argument of such and such a case." He asked, "Did I say that?" I answered, "I have the shorthand notes before me, and your Lordship is made to say that." He said, "If I said that, with very great respect for myself, I think I was wrong."

The present constitution of the Privy Council as a whole is not of much importance. It is never called together except in case of the demise of the Crown. Parliament has, however, taken into its own hands the constitution of the Judicial Committee. The Committee was formerly constituted by the Privy Council itself but that practice no longer obtains.

At the present time the Judicial Committee consists of the Lord Chancellor, the Lord President of the Council, all ex-Lords President, six Lords of Appeal in Ordinary, those members of the Privy Council who have held high judicial office (Lord Chancellor, member of the Judicial Committee, Lord of Appeal in Ordinary or Judge of a Superior Court in England, Ireland or Scotland) and seven from the Dominions overseas.

The present Chancellor is Lord Buckmaster (at least he was yesterday; I do not know whether he is to-day), long an active and successful practitioner at the English Bar. He was Solicitor General on the resignation of Lord Haldane in 1915, and on Sir John Simon the Attorney General declining to accept the Woolsack (as he preferred to remain in the House of Commons and active politics) Buckmaster received the prize of the profession.

Former Lords Chancellors are the Earl of Halsbury, over ninety-one years of age, but still vigorous physi-

cally and mentally and paying the debt which every lawyer owes to his profession by editing the *Cyclopaedia of the Laws of England*, and the Earl Loreburn who as "Bobby Reid" was a tower of strength to the Gladstonian party, as charming a companion (*crede experto*) as he is accomplished as a lawyer. There is also the acute and metaphysical Viscount Haldane whom many Americans remember with admiration addressing the American Bar Association in Montreal a few years ago. Then come the Scot, Andrew Graham Murray, Lord Dunedin, sometime Lord Advocate and then Lord Justice General of Scotland, the Irishman John, Lord Atkinson, formerly the brilliant Attorney General for Ireland, another Scot, Lord Shaw of Dunfermline formerly Solicitor General and Lord Advocate for Scotland—these two Scotsmen are no unworthy successors of Lords Watson and Robertson now no more.

Lord Mersey (Sir John Bigham) of fame and power in Admiralty cases and Lord Moulton better known as Lord Justice Fletcher Moulton, a man of great and accurate scientific knowledge, Director General of Explosives Supply, a F.R.S. and F.R.A.S. come next. Then Lord Parker, who came to the Council after seven years' experience as a Judge of the High Court of Justice, and Lord Sumner who had only three years' experience on the Bench, Lord Parmoor deeply versed in ecclesiastical matters, Lord Wrenbury who as Mr. Buckley was an authority on Company Law and lost none of his repute when he became Mr. Justice and Lord Justice Buckley, and Sir Arthur Channell also came from the High Court of Justice. There are other British mem-

bers *ex officio* whom I do not wait to name; they seldom if ever take part in the hearing and decision of appeals.

Let us leave now the list from the Mother Country and see who come from across the seas. We find Sir Samuel Griffith, Chief Justice from Australia, Sir Edmund Barton also from Australia, Sir Charles Fitzpatrick, Chief Justice of Canada, Sir James Rose-Innes, Chief Justice of South Africa and Sir Lawrence Jenkins formerly a Chief Justice in India. But the list is not exhausted; Syed Ameer Ali, a Mohammedan claiming to be a Syed in fact, that is, a descendent from Mohammed and glorying in his faith and race, has been for many years a member of the Committee.

“When there is an Ecclesiastical appeal, Archbishops and Bishops also sit—as ecclesiastical assessors; in the rare case of an appeal from beyond the seas in an admiralty matter, Admirals or other naval officers sit as naval assessors. For example in the well-known case, *Read vs. Bishop of Lincoln* (1892, A. C. 644) the Bishops of Chichester, St. Davids and Lichfield sat; and in a case from his Majesty’s Supreme Court for China and Corea in 1908 (A. C. 251) Admiral Lloyd and Commander Caborne.”

What are the functions of this extraordinary body?

“At the present time this Judicial Committee hears appeals in English cases only in Ecclesiastical matters. Upon every appeal of this character, at least three Bishops must sit as assessors, under the provisions of a rule made in 1876. The ultimate appeal in other matters from England goes to the House of Lords. In Scottish and Irish matters the Committee does not exercise any appel-

late jurisdiction whatever. But from Courts all over the world wherever the map is marked with red, come appeals. In Europe, from the Channel Islands, the Isle of Man, Gibraltar and Malta as well as from Cyprus; in Africa from the Cape of Good Hope, Natal, the Transvaal, the former Free States, the Gold Coast, Sierra Leone, Zululand, Rhodesia, St. Helena, Lagos, Basutoland, Bechuanaland, the Falkland Islands, Mauritius, Gambia, Griqualand and other 'lands', more or less unknown; in Asia from Bombay, Calcutta, Madras, the N. W. Territory, Aden, Assam, Beluchistan, Burmah, Upper and Lower Oudh, Punjaub, Ceylon, Mauritius, Hong Kong, Borneo, Labuan; in Australasia, Australia, New Guinea, Fiji, New Zealand, Norfolk and Pitcairn Islands and in America from Canada and her Provinces—Ontario, Quebec, Nova Scotia, New Brunswick, Prince Edward Island, Manitoba, Saskatchewan, Alberta, British Columbia and from Newfoundland, Bermuda, the Bahamas, Jamaica, British Honduras, and from Guiana in South America and many another British Island lying in that Carribean Sea.

The laws of a score of self governing communities must be interpreted; the English Common Law of the English-speaking colonies modified by local Statutes in Quebec the Coutume de Paris with similar modification, the many varying and various laws of the many East Indian peoples, the Roman Dutch law of the South of Africa, the still more complex law of Malta—all these and more come before that assembly of jurists."

There have been many decisions by the committee in disputes between man and man—decisions of the greatest moment and the most far reaching character.

I do not however dwell upon private litigation. No small part of the labors of the Judicial Committee has been the decision of what in the United States are called constitutional questions. The word "constitutional" has not the same connotation with us as with you. In the American sense "constitutional" means in accord with the written "constitution." With us it means in accord with the more or less vague principles upon which we conceive government should be carried on. With you what is unconstitutional is illegal however just and laudable it may be, with us that is unconstitutional which is wrong however legal it may be.

It was decided in *re Bedard* (1849) 7 Moore P. C. 23, that the Governor of a Colony like Canada represented Her Majesty and had power (e.g.,) to grant a patent of precedence to a newly appointed judge. But the power of a Colonial Governor in Council must be exercised in (substantially) the proper and regular way. Sometimes a Judge has been "amoved" by the Colonial authorities and reinstated by the Judicial Committee because unjustly treated by being deprived of a right to be heard. Sometimes in such a case the "amotion" has been sustained. In *Montague vs. Lieutenant Governor Van Dieman's Land* (1849) 6 Moore P. C. 489, the Judge was called on to show cause against an order for suspension only and he was amoved. The Committee held that the irregularity did not prejudice him and sustained the order of amotion. I shudder to think what would happen if an American Court were to decide the same way.

There are very many cases dealing with the power of a Colonial Parliament to punish for contempt. A com-

paratively late instance is *Doyle vs. Falconer* (1866) L. R. 1 P. C. 328. Some of these point out that the Colonial Parliament is not a Court like the Imperial Parliament as it has no judicial functions. But that the power of punishing for contempts which tend to obstruct its proceedings and directly to bring its authority into contempt is inherent in every Supreme legislative authority is affirmed by such cases as *Beaumont vs. Barrett* (1836) 1 Moore P. C. 59.

Since the Governor in Council is not quite the King-in-Council and the Colonial Parliament is not quite the Imperial Parliament, there will sometimes arise a question of the limits of legislative power in the local Parliament, and such cases have been coming before the Committee with great frequency. Occasionally the question may require the elucidation of the common law powers of the Imperial Parliament, as for example as in *Devine vs. Holloway* (1861) 14 Moore P. C. 290, where the effect of a demise of the Crown came under consideration.

But in every case the extent of the power granted to the local Parliament must be looked at, and it has been uniformly held that a local Parliament acting within the ambit of the limits prescribed for it "is not in any sense an agent or delegate of the Imperial Parliament but has plenary powers as large and of the same nature as those of Parliament itself," *The Queen vs. Burah* (1878) 3 A. C. 889 at p. 904; and consequently it can delegate its powers, etc., which no mere agent could do. *Hodge vs. the Queen* (1883) 9 A. C. 117 at p. 132.

These powers must be restrained strictly within the limits prescribed. The Dominion Parliament has "Crim-

inal Law" for one of its objects but that does not enable it to make into a crime an act committed outside of the Dominion as the Imperial Parliament could, *Rex vs. Brinkley* (1907) 14 O. L. R. 434.

I heard stated this morning something that startled me more than anything else in the whole course of my legal career, namely, that the Judicial Committee of the Privy Council has been declaring certain laws passed by local legislatures void as against justice and common right. I have been practising law a great many years, and I have never found such a case.

What the Judicial Committee of the Privy Council does is this. It looks at the Imperial statute by which the local legislature is formed. It finds out the powers which are given by that statute, and if any powers in that statute are exercised, the Judicial Committee never considers whether such exercise is just or right or honest. I shall give you an example.

Not so very long ago, before I went in the Appellate Division, and was sitting on the trial bench, I had occasion to try a case, the *Florence Mining Company vs. Cobalt*. The *Florence Mining Company* claimed the ownership of certain mining lands. The Parliament of Ontario, the Legislative Assembly—we have only one House there, and that is enough for us; we are too busy up in Ontario, and too poor, to be bothered with two Houses. I may say that in seven out of nine provinces in Canada they have only one House, two of the provinces still retaining their two Houses; but we in Ontario cannot be bothered with two, as I said.

Well, the legislature of the Province of Ontario passed

an Act saying that the land should belong to the Cobalt Mining Company, mentioning the particular land. The action was brought by the Florence Mining Company against the Cobalt Company, and tried before myself. I went into the facts fully, tried out the facts in the sense of hearing all the facts. I thought it fairly well proved that the land was the property of the plaintiffs originally and before that Act. But I decided that the prohibition, "Thou shalt not steal" does not extend to the sovereign legislature, and I said so in just those blank, bald, words. I decided that the legislature had the right and power of taking that property, even if admittedly of A, and saying that it should be the property of B.

Now, a more gross thing than that, absolutely against all common right, nobody could think of, nobody could conceive of. I refused to pass upon the facts; I said, "I shall assume the plaintiffs have proved their case. I shall decide this upon the constitutional question."

It went to the Court of Appeal; the Court of Appeal went into the facts very fully and decided against the plaintiffs on the facts, but at the same time the Court of Appeal said that the law constitutionally laid down by the learned trial judge was unexceptional and perfectly good law.

That went to the Privy Council, and the Privy Council upheld this decision on both grounds. They said that even if the plaintiffs had proved their case the legislature of the Province of Ontario had the power to take away the property of one person and give it to another.

What the Judicial Committee has done (I venture to think), in all those cases to which my friend has alluded,

has been to go carefully into the Acts of the legislature; that they have gone into the charter of the Province, if you please to use that terminology, and have investigated what power that charter has given to the legislature. They have decided in more than one case, no matter how small a legislature it may be, even of the smallest British island in the world, that so long as the legislature is acting within the ambit, within the four corners of the power which is given to it by the Imperial House, they have the power to do as they please, steal, or anything else they see fit.

In our system it is the people who are the ultimate court of appeal. If the Government did any stealing the matter would come before the people at the next election, and if the people wanted a government that stole, I suppose the people would return the government at the next election. But it is highly probable that if the government did anything of that kind, there would be such a cry raised that it would not be continued. I want you to understand that we are not a larcenous people naturally.

It is at once manifest the very large number of cases which involve the extent of the powers of the Colonial Legislature. In Canada the question has been for nearly half a century complicated by the division of legislative power between Dominion and Provinces. The British North America Act of 1867, sometimes called the written constitution of Canada, sets out fully the objects of legislation of Dominion and Province respectively. The judicial interpretation of this Act has called out the greatest ingenuity and learning from the Com-

mittee and Counsel, and the end is by no means yet. The same sort of dispute may be expected in Australia now federated.

In addition to determining whether this or that legislation is *intra* or *ultra vires* ("constitutional" or "unconstitutional" in the American terminology) questions have arisen more like disputes between States.

In the British North America Act in addition to the division of legislative functions, there is a division of property between Dominion and Province—and it must be remembered that a gift of legislative power concerning any property is not a gift of the property itself. Attorney-General (Dominion) vs. Attorney-General (Province) 1898, A. C. 700, at pp. 709-711.

Many disputes concerning property have come before the Judicial Committee and it has always been considered that such disputes are to be decided on a rule or principle of law and not on what might be thought fair. Dominion of Canada vs. Province of Ontario, (1910) A. C. 637.

The Judicial Committee decides the law; it has no hesitation, if necessary, in changing its action. It has said in at least two cases that, "What we said on such an occasion is not law; we were mistaken. The law is so and so" and they decide the law.

The Committee has been called on to decide the ownership of real estate of which the owner died without leaving heirs and without a will. This was allotted to the Province not to the Dominion, Attorney General Ontario vs. Mercer (1883) 8 A. C. 767.

An interesting case arose under the following circumstances. In 1763 certain tribes of Indians were granted

possession of certain lands as hunting grounds "for the present." In 1873 the Indians surrendered this land; (we have had no trouble with Indians—no "H. H." can write a "Century of Dishonor" concerning Canada) and the question arose who should own it. The Judicial Committee supported the claim of the Province and affirmed the decision of the Canadian Courts—*St. Catharines Milling & Lumber Co., vs. The Queen* (1888), 14 A. C. 46—the same kind of question arose in a later case which I do not stop to discuss. *Attorney General (Dominion) vs. Attorney General Ontario* (1897) A. C. 199.

British Columbia came into the Dominion in 1871 on the express bargain that the Canadian Pacific Railway should be built across Canada. The land was owned by the Province. The Province granted to the Dominion lands 20 miles on each side of the Canadian Pacific Railway's line, so that the Dominion could give that to the Canadian Pacific Railroad as a bonus for building the road. It turned out that there were precious metals in and under part of this land. The Dominion claimed them, but the Committee held that precious metals, gold, and so on, are not incidents of land but belong to the Crown, and therefore like other royalties, belong to the Province. *Attorney-General (B. C.) vs. Attorney-General (Canada)* (1889) 14 A. C. 295. So we have the fact of land solemnly granted by the Province to the Dominion, but that grant did not carry the royalty—that is, the precious metals which were in and under that land.

The ownership of fisheries and fishing rights, of rivers and lake improvements, and of harbours was strongly

contested and was decided by the Committee, Attorney General (Dominion) vs. Attorney General (Provinces) (1898) A. C. 700.

Swamp lands in Manitoba were a matter of dispute and decision, Attorney General (Manitoba) vs. Attorney General (Canada) (1904) A. C. 199; the foreshore in British Columbia in Attorney General B. C. P. R. C. vs. (1906) A. C. 204; water-rights in the railway belt in British Columbia in Burrard P. Co., etc. vs. The King, (1911) A. C. 87, and fishing rights in the same Province Attorney General (B. C.) vs. Attorney General (Canada) (1914) A. C. 153.

It will be seen that the curious situation has not infrequently arisen of land or other property situated within a particular Province being claimed as its own by the Dominion; and indeed all property in the Dominion must be in some Province or another (except such as is in the Yukon and other non-provincial territories).

Since the public property of the whole of the British dominion is in the King, it would seem odd that the King in one capacity would be at law with himself in another, but there is no practical difficulty. When a dispute arises we make the Attorney General of the Dominion party of the one part and the Attorney General of the Province party of the other part.

Another dispute, a dispute between two provinces, is not unlike certain of the disputes which have come before the Supreme Court of the United States:

“By the British North America Act (1867), the Province of Ontario was given the same limits as the former Province of Upper Canada. Ontario always claimed

practically the whole district west of Lake Superior to the Rocky Mountains. She claimed originally up to the South Sea, but she limited her claim ultimately to the Rocky Mountains. And there is a great deal of authority, too, for the supposition that the old Province of Upper Canada went as far west as the Rockies.

"In 1870 by the Dominion Act, 33 Vic. c. 3, the Province of Manitoba was formed with its eastern boundary at the meridian of 96° W. L. At once there was a movement in Ontario, the Government of that Province claiming that it went further West than 96° W. L. although this had long been considered in fact about her western limit. Many communications passed between the Governments, but without result. Then in 1876 an Act was passed (39 Vict. c. 21) extending the limits of Manitoba to the 'westerly boundary of Ontario.' You can see at once that trouble would arise. The Dominion and Manitoba claimed that the westerly boundary was about six miles east of Port Arthur, coming east about where Grand Portage, Minn., is on the shores of Lake Superior. Armed forces of the Provinces of Manitoba and Ontario took possession of Port Arthur, but the scandal was abated by an agreement to arbitrate, December 18, 1883, by the Dominion and Province. Ontario named William Buell Richards, Chief Justice of the Province, and when he became Chief Justice of Canada, his successor Robert A. Harrison, the Dominion, Sir Francis Hincks, and the two Governments jointly Sir Edward Thornton the British Ambassador at Washington.

"These arbitrators made, August 3, 1878, a unanimous award in favour of the Ontario contention, which by this

time was in reality limited to the generally recognized boundary. This was at once accepted by Ontario, but the Dominion refused to ratify the award. At length, in 1883, the two provinces concerned agreed to submit to the Judicial Committee of the Privy Council three questions (1) whether the award was binding, as the Dominion claimed that no government can bind the country to anything that requires an act of Parliament; (2) if not, what was the true boundary, and (3) what legislation was necessary to make the decision effectual.

"The Judicial Committee, August 11, 1884, decided (1) in the absence of Dominion legislation the award was not binding, (2) the award laid down the boundary correctly, and (3) Imperial legislation was desirable (without saying it was necessary).

"The Imperial Act (1889) 52 and 53 Vic. c. 28, carried the decision into effect, and ended the controversy."

I should like to add here some words of my own with which I closed the address to the Missouri Bar Association already mentioned:

"There have been occasions upon which suggestions have been made, more or less seriously, that the jurisdiction of the Privy Council over self-governing communities, such as we have in Canada and as are in Australia and New Zealand, should cease. For example when the Supreme Court of Canada was established in 1875, there was considerable discussion looking to the abolition of the right to appeal to the Privy Council from the Court so established. Wiser counsels prevailed and no attempt was made to prevent such appeals by legislation. Now an appeal lies as of right from the highest court in each

Province in cases of sufficient magnitude and also by special leave from the Supreme Court of the Dominion.

"No feeling exists that this should be altered—occasionally of course the unsuccessful party to an appeal, and those who sympathize with him make a doleful noise against the Board but this speedily dies out.

It is wholly beyond controversy that Canadians generally would deplore any attempt to interfere with their traditional right to apply for justice to the foot of the throne.

"In other colonies the right continues in a more or less complete form—and from all appearances will so continue while the British Empire itself continues—and may that be not *ad multos annos alone*, but *in aeternum*."

Whatever may be the case in respect of private litigation, it seems to me that the Judicial Committee will have forever the task of determining controversies between the integral parts of the Empire.

THE PRESIDING OFFICER: Gentlemen, notwithstanding the fact that Mr. Justice Riddell is so unwilling to have us understand that he put himself out to come here, and there is no physical distance (although from what he said I opine he thinks there is an intellectual distance) between the old and the new, I nevertheless feel that I expressed your opinion when I assured him that we are very grateful indeed for his presence, whether he came here or not.

The Committee on Arrangements could not know that the question of *Marbury vs. Madison* would be a live topic this morning, but I am sure, as showing the foresight, and as you will see in a few moments, the wisdom

of the Committee, arrangements were made to have Mr. Marbury himself here, and the only original will appear today and speak to you, not about his own cases or his former cases, but on the question, "How Does the Supreme Court Draw the Line Between Justiciable and Non-Justiciable Questions. Gentlemen, Mr. Marbury."

HOW DOES THE SUPREME COURT DRAW THE LINE BETWEEN JUSTICIABLE AND NON-JUSTICIABLE QUESTIONS?

WILLIAM L. MARBURY

Since I have had occasion to give some study and some investigation to the question which has been assigned to me to-day, namely, the question as to how the Supreme Court of the United States draws the line between justiciable and non-justiciable questions, I have brought back to my mind a rather comical occurrence of my childhood. I remember when I lived down in southern Maryland, not very far from where we are now, a land where in those days it was always afternoon, when we had plenty of time, and where we were very much, in fact, like that celebrated party in the Forests of Arden who, under the shade of overhanging boughs, did lose and neglect the creeping hours of time—it was a charming country, and I remember this funny incident.

There was a minstrel show of some kind; at any rate, a funny man came on the stage, with his face blackened with cork, and made a speech on the subject of woman's rights. All I remember about the speech is the opening sentence. He said, "Fellow citizens, women ain't got no rights."

When I read the question which I have been assigned to discuss, as to how the Supreme Court draws the line in controversies between states, between justiciable and non-justiciable questions, I find that I shall have to answer it very much after the manner of the minstrel actor, of whom I have spoken. There is no line drawn of the kind which is generally supposed to be drawn—judicially—as I shall endeavor to demonstrate.

The purpose of this paper is, primarily, to endeavor to ascertain what controversies between States of the Union are justiciable under the judicial power vested in the Supreme Court of the United States by Section 2 of Article III of the Federal Constitution.

After providing in Section 1 of Article III that "The judicial power of the United States shall be vested in one Supreme Court, and in such inferior courts as the Congress may from time to time ordain and establish,"

Section 2 then proceeds to provide:

"The judicial power shall extend to all cases, in law and equity, arising under this Constitution, the laws of the United States, and treaties made, or which shall be made, under their authority; to all cases affecting ambassadors, other public ministers, and consuls; to all cases of admiralty and maritime jurisdiction; to controversies to which the United States shall be a party; to controversies between two or more States; between a State and citizen of another State, between citizens of different States, between citizens of the same State claiming lands under grants of different States, and between a State, or the citizens thereof, and foreign States, citizens or subjects.

"In all cases affecting ambassadors, other public ministers, and consuls, and those in which a State shall be a party, the Supreme Court shall have original jurisdiction. In all other cases before mentioned, the Supreme Court shall have appellate jurisdiction, both as to law and fact, with such exceptions, and under such regulations, as the Congress shall make."

It is familiar history, of course, that immediately after the decision of *Chislm vs. Georgia*, 2 Dallas, 419, holding that under the provisions of the Section just quoted, the Supreme Court could hear and decide a suit brought by a private citizen of one State against another State, the Eleventh Amendment was immediately adopted, providing that

"The judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by citizens of another State, or by citizens or subjects of any foreign State."

This Amendment left the judicial power of the United States—the jurisdiction of the Supreme Court with regard to controversies between two or more States, exactly as it was prior to that Amendment, the sole effect of the Amendment being to prevent any suit from being prosecuted or commenced against one of the United States by citizens of any other State or by citizens or subjects of any foreign State.

Before beginning a review of the cases which have been decided by the Supreme Court involving controversies between the States under the grant of judicial power and jurisdiction contained in those sections of the

Constitution which I have quoted, it will probably conduce to a clearer understanding of the scope and meaning of those provisions if we look for a moment at the history and conditions which led up to their incorporation into the Constitution.

By Article IX of the Articles of Confederation, it was provided:

- "The United States in Congress assembled shall also be the last resort on appeal in all disputes and differences now subsisting or that may hereafter arise between two or more States concerning boundary, jurisdiction or any other cause whatever; which authority shall always be exercised in the manner following," etc.

Provision was then made for the commencing of such proceeding by any State, in controversy with another upon the filing of a petition with Congress stating the matter in question; and provision was also made for the method of selecting the members of the tribunal to hear and determine the controversy.

The judgment of this tribunal was made final and decisive.

Whatever other defects there may have been in the Articles of Confederation, the provision which I have read was intended to confer, and actually did confer, judicial power upon the Confederation, in the manner described, to adjudicate and determine all disputes and differences concerning boundary, jurisdiction or any other cause whatever; no exception or limitation of any character being placed upon the exercises of this power.

Connecticut submitted to a degree of the Council of Trenton acting pursuant to the authority of the Confed-

eration in a dispute with New York and Pennsylvania, in which she claimed jurisdiction over certain territory, the Commission deciding against the claim.

During the Revolution and at the time of the adoption of the Constitution, boundary disputes existed between Massachusetts and Rhode Island, New Jersey and New York, New Jersey and Delaware, Maryland and Virginia and between several other of the States.

These disputes, it is important to note, involved the exercise of sovereign governmental power by the several States over given areas of territory.

They could not be settled without denying to one or the other of the States which were parties to the controversies an exercise of sovereignty over the territorial area in dispute.

I emphasize the nature of the question involved in these controversies at this time, because of the importance of its bearing upon all that I shall hereafter say upon this subject.

When, therefore, the members of the Constitutional Convention of 1787 were deliberating upon a new Constitution, it must have been obvious to them, that as in the Articles of Confederation so in the new instrument, some provision would have to be made for the settlement of disputes between the States.

Let us look for a moment at the general structure of the Government which that Convention planned.

Great and important powers were to be delegated to the New Federal Government. These powers so delegated concerned those matters in which all the States had a common interest; in other words, they had to do

with those affairs, which speaking generally, we call National. But going along with this idea of a Federal Government for National purposes was another idea of equal importance; that the States should retain their original sovereignty as separate States, except insofar as they had granted any part of that sovereignty under the Constitution to the Federal Government.

The Federal Government was therefore to be one of enumerated powers; all other powers of government were retained by the several States or by the people.

As under this plan a large residuum of power was left in the States, placed beyond the reach of the Federal Government, it was obvious to the framers of the Constitution that in the exercise of those reserved or ungranted powers on the part of the States, disputes or differences might arise from time to time between them.

It is true, of course, that the main object of the Constitution was to remove from the field of State legislation, those matters of national concern upon which conflicting State legislation had theretofore wrought great havoc to the interests of the people as a whole, and had produced such a feeling of bitterness among the States as to endanger the public peace. In line with this purpose the regulation of interstate commerce, the fixing of duties upon imports, the power to declare war and peace, to maintain an army and navy, and other great powers were delegated to the National Government.

But notwithstanding this studious effort to remove by this means the sources of conflict, it was apparent that a source of danger still remained in the possible exercise of those ungranted powers of each State in such

a way as to bring about a conflict of authority with another State, and the possibility of serious differences between them.

In order to comprehend clearly the subject, we must observe the fact that the subject matter of these possible differences between the States lay entirely outside of any matter dealt with in the Constitution itself, and pertained to those things which the States with such zealous care left free from the action or control of the National Government.

The situation was one accordingly where a means of settling disputes arising *extra* the Constitution, had to be provided by the Constitution.

The provision which I have read, giving the Supreme Court jurisdiction over controversies between two or more States, is the plan of settlement which the Convention adopted. In order to be accurate, I should say that it is the ultimate means, because another provision of the Constitution contemplates one other possible means of adjusting differences between the States, viz: by agreement or compact under the sanction of Congress. As, however, this latter means of settlement rests upon the voluntary action of the States, we may ignore it for the purposes of this discussion and deal with that method which alone has in it the necessary element of compulsion.

Our inquiry now is, what was accomplished by prescribing this means of settling such controversies? The question in the broad way in which I have stated it suggests several narrower ones. In the first place, we should inquire what kind or character of controversies were

intended to be embraced within the general terms employed in the Constitution. In the second place, we are interested to know how these controversies are to be decided, that is, what law or rule is to guide the Court in passing judgment upon the particular case before it.

These are inter-related questions; because whether or not a Court may decide a given case depends to a large extent upon the body of the law which the Court is constituted to administer, and conversely the question of what law or rule the Court is to follow may depend likewise upon the nature of the controversies over which it is given jurisdiction.

The answer to both of these questions I think can be now fairly accurately determined by looking to those cases which have been actually adjudicated by the Supreme Court in pursuance of the power conferred upon it by the provision of the Constitution in question.

Time does not permit a full review of all these decisions, for the number is great, and I shall limit discussion to those which approach most nearly toward fixing the boundary line between what is or what is not embraced within this important grant of power to that Court.

For the first one hundred years the cases which the Supreme Court was called upon to consider where two States were parties, with one exception, involved questions of boundary.

As early as the August term of the Supreme Court in 1799 (4 Dallas 1) New York sought to invoke this provision of the Constitution against the State of Connecticut to enjoin certain suits in the Courts of Connecticut involving title to certain lands which lay within an area over which New York claimed jurisdiction.

As the parties to these suits in the Connecticut Court claimed under grants of the respective States and the question as to who had title depended upon which State had jurisdiction over the land in dispute, New York asserted that the controversy was in effect one between the two States. It asked that the further prosecution of the suits in Connecticut be enjoined. The Supreme Court refused to grant this injunction on the ground that the State of New York was not a party to the suits below nor interested in their decision.

We will not pause now to consider this decision further, because the question with reference to the power of the Court to settle controversies as to jurisdiction between the States has been explicitly determined by later cases in the affirmative, particularly in the case of *Rhode Island vs. Massachusetts* (12 Peters 657).

In this case the scope of the power and jurisdiction conferred upon the Supreme Court concerning controversies between the States was first brought under full consideration by the Court.

The case involved a boundary dispute between the two States, parties to the suit. Each claimed jurisdiction and possession as a sovereign government over the territory in question. The State of Massachusetts, the defendant, moved to dismiss the bill filed by the State of Rhode Island, and in support of this motion relied mainly upon two propositions:

First. That the judicial power conferred upon the United States did not embrace a controversy between two States involving the exercise of political, governmental sovereignty upon the part of one or the other of the States.

Second. That this want of jurisdiction was also established by the fact that the Constitution furnished no rule of decision in such cases, and the Court could not maintain jurisdiction and decide a case when no body of law had been provided affording rules and principles for the guidance of the Court in deciding such cases.

These propositions were supported by the arguments that the assertion of the sovereign jurisdiction over territory by a State raised a purely political question; that no State could be deemed to have yielded to a tribunal not created and acting under the authority and control of the State itself, the determination of a matter so vital to its political existence and sovereignty; that the judicial power of the Government of the United States extends by the Constitution only to cases of *law* and *equity*, which terms have relation to English Jurisprudence, and that suits involving political rights were not of the class belonging to law and equity as administered in England.

It was further urged that by the Judiciary Act of 1789, the jurisdiction of the Supreme Court where a State is a party, is confined to cases of a "*civil nature*," this qualification not having reference to any distinction between civil and criminal cases (for no State could be prosecuted by another State as a criminal) but was intended to have reference to cases not political or involving question of sovereign power between States.

In a very elaborate opinion Mr. Justice Baldwin, speaking for the majority of the Court, overruled both of these contentions. It was held that in looking to the unqualified language of the clause conferring jurisdic-

tion upon the Supreme Court, to the comprehensive terms of the Articles of Confederation upon the same subject, and to the history of the time in which the Constitution was framed, it must be deemed to have been intended to include *all* controversies which arise between the States.

It was further held that the term "controversies of a civil nature" as used in the Judiciary Act, must be taken to be co-extensive with the judicial power granted under the Constitution.

It was pointed out, after a full review of the other provisions of the Constitution and its general plan in establishing the relation between the States and the Federal Government and between the States themselves, that the grant of judicial power must have been intended to be comprehensive, and to embrace all controversies without any exception by reason of their political character for the reason that the Constitution forbade any other means of settlement except by agreement or compact with the consent of Congress, which, of course, might entirely fail by reason of the States in the first instance being unable to agree.

In other words, that not only were questions of a *political* nature not excluded, *but were from the necessities of the case the very kind of controversies which it must have been primarily the intention of the Constitution to include.*

Said the Court (p. 726):

"If the Constitution has given to no department the power to settle them they must remain interminable; and as the large and powerful States can take possession

to the extent of their claim, and the small and weak ones must acquiesce and submit to physical power; the possession of the large State must consequently be peaceable and uninterrupted; prescription will be asserted and whatever may be the right and justice of the controversy there can be no remedy though just rights may be violated. Bound hand and foot by the prohibitions of the Constitution, a complaining State can neither treat, agree nor fight with its adversary, without the consent of Congress; a resort to judicial power is the only means left for legally adjusting or persuading a State which has possession of disputed territory, to enter into an agreement or compact, relating to a controverted boundary. Few, if any, will be made, when it is left to the pleasure of the State in possession; but when it is known that some tribunal can decide on the right, it is most probable that controversies will be settled by compact."

In granting to the National Government judicial power in the way found in the Constitution,

"The States," says the Court, "submitted to its exercise, waived their sovereignty, and agreed to come to this Court to settle their controversies with each other excepting none in terms. So they had agreed by the Confederation; not only not excepting but in express terms including all disputes and differences whatever."

And as to the fact that the question before the Court was a political controversy, it was said:

"The members of the General and State Conventions were alike fatuous, if they did not comprehend and know the effect of the States submitting controversies between themselves, to judicial power; so were the members of

the first Congress of the Constitution, if they could see, and not know, read and not understand its plain provisions, when many of them assisted in its framing. The founders of one Government could not but know what has ever been, and is familiar to every statesman and jurist, that all controversies between nations, are in this sense *political* and not judicial, as none but the sovereign can settle them. . . . There is neither the authority of law nor reason for the position that boundary between nations or States is in its nature any more a political question than any other subject on which they may contend.

"None can be settled without war or treaty, which is by political power; but under the old and new Confederacy they could and can be settled by a Court constituted by themselves, as their own substitutes authorized to do that for States which States alone could do before" (pp. 736-737).

And having thus disposed of the contention that the subject matter of the dispute was not cognizable by the Court under the judicial power, it proceeds to state the way in which such cases should be determined, and what law is to be applied.

It is said upon this subject (p. 737):

"The submission by the sovereigns or States, to a Court of law or equity of a controversy between them, without prescribing any rule of decision, gives power to decide according to the appropriate law of the case; 11 Ves. 294; which depends on the subject matter, the source and nature of the claims of the parties and the law which governs them. From the time of such sub-

mission, the question ceases to be a political one, to be decided by the *sic volo sic jubeo*, of political power; it comes to the Court to be decided by its judgment, legal discretion and sole consideration of the rules of law appropriate to its nature as a judicial question; depending on the exercise of judicial power; as it is bound to act by known and settled principles of national or municipal jurisprudence as the case requires.

"It has never been contended that Prize Courts and admiralty jurisdiction or questions before them, are not strictly judicial.

"They decide on questions of war and peace, the law of nations, treaties, and municipal laws of the capturing nation, by which alone they are constituted; *a fortiori* if such Courts were constituted by a solemn treaty between the States under whose authority the capture was made, and the State whose citizens or subjects suffer by the capture.

"All nations submit to the jurisdiction of such Courts over their subjects, and hold their final decrees conclusive on the rights of property."

The Court then goes on to show that all the questions involved in the boundary controversy depend upon a simple ascertainment of facts, and the application to them of plain principles of equity.

It is true in this case that the Court had no occasion, by reason of the fact of the case, to go beyond the ordinary rules of law and equity for the determination of the controversy, except to the extent of bringing sovereign States within the operation of those principles, but there is the strongest implication in its language that any con-

troverſy cognizable by the Court—and it held that all controverſies were within its jurisdiction—would be determined by the appropriate rule whether it be an ordinary rule of municipal jurisprudence, or one of general right and juſtice.

In *Wisconsin vs. Pelican Insurance Company*, 127 U. S., 286, an original action was brought in the Supreme Court of the United States by the State of Wisconsin upon a judgment recovered by that State in one of its own Courts againſt the Pelican Insurance Company, a Louisiana Corporation, for penalties impoſed by a ſtatute of Wiſconſin for not making returns to the Insurance Commissioner of the State as required by that ſtatute.

It will be remembered that in addition to controverſies between the States, the Supreme Court is given original jurisdiction over other controverſies, among which are controverſies to which a State is a party.

In the caſe under conſideration, it was argued that the ſuit could not be maintained becauſe of the general rule that the Courts of no country will execute the penal laws of another, and that this applies not only to proſecutions and ſentences for crimes and miſdemeanors, but to all ſuits in favor of the State for the recovery of pecuniary penalties for any violation of ſtatutes for the protection of its revenue or other municipal laws and to all judgments for ſuch penalties. The Court accepted this contention and held that it could not entertain an original ſuit in ſuch a caſe.

In a later caſe, it has been pointed out that all this caſe decided was that the principle contended for by the Insurance Company was a mere bar to a recovery upon the

merits, and that the case did not hold as the language of Justice Gray, who delivered the opinion of the Court, would seem to imply, that the Court did not have *jurisdiction* over the controversy.

It is to the great case of *Kansas vs. Colorado* (206 U. S.) that we must look for the final word upon the question with which we are concerned.

For the nature of that case was such as to require, upon the part of the Court, a thorough and exhaustive examination of the scope of the judicial power of the National Government over controversies between the States.

In this case, the State of Kansas filed a bill in the Supreme Court of the United States against the State of Colorado to restrain the latter State and certain corporations, organized under its laws, from diverting the water of the Arkansas River for the irrigation of lands in Colorado, thereby, as alleged, preventing the natural and customary flow of the river into Kansas and through its territory.

It was admitted by Kansas that the strict rules of the common law prohibiting substantial diversion as against a lower riparian owner had been to some extent modified in the western States so that flowing water might be appropriated to mining and irrigation purposes, and that the doctrine of prior appropriation obtained, but it was contended on behalf of Kansas that such modifications had not gone so far as to justify the destruction of the rights of other States and their inhabitants altogether.

The case presented was one, of course, where the two States were dealing, *so far as their own internal interests were concerned*, with a matter clearly within their sovereign

jurisdiction. But it was claimed by the one State that the other had so exercised its power as to interfere with its rights and interests, and the jurisdiction of the Supreme Court was invoked for the purpose of having it determine whether the way and the extent to which the State of Colorado was using the water of the stream were right and proper when the interests of both States were considered.

There was another aspect of this case which adds greatly to its importance.

The Government of the United States filed an intervening petition claiming a right to control the waters of the river to aid in the reclamation of arid lands, no claim, however, being set up that the diversion of the waters tended to diminish the navigability of the river.

It was asserted by the United States that as the situation presented was one with which the States could not themselves deal, it being beyond their power to control the sovereign action of another State and as the matter was one in its very nature of national concern, it must follow that the power of dealing with it had passed to the National Government as a part of its inherent sovereignty.

Upon the petition of the Government, the Court held that the Government of the United States is one of enumerated powers, and that the enumeration of these powers is to be found in the Constitution of the United States and in that alone.

The Court expressly rejected the contention that the United States has any inherent powers of sovereignty, and held that Congress had no power to control the flow of

water within the limits of a State, except to improve or preserve the *navigability* of the stream; that the full control over those waters is, subject to the exception named, vested in the State.

As to the controversy between the two States, the Court held that the controversy involved a justiciable question and was clearly within the jurisdiction of the Court.

Said the Court:

"Now the question arises between two States, one recognizing generally the common law rule of riparian rights and the other prescribing the doctrine of the public ownership of flowing water.

"Neither State can legislate for or impose its own policy upon the other. A stream flows through the two and a controversy is presented as to the flow of that stream. It does not follow, however, that because Congress cannot determine the rule which shall control between the two States or because neither State can enforce its own policy upon the other, that the controversy ceased to be one of a justiciable nature, or that there is no power which can take cognizance of the controversy and determine the relative rights of the two States. Indeed the disagreement, coupled with its effect upon a stream passing through two States, makes a matter for investigation and determination by this Court."

Addressing itself to the often repeated general statement that there is no Federal Common law as distinguished from the common law of the several States, the Court makes this most significant and far-reaching statement:

"What is the common law? Kent says (vol. 1, p. 471): 'The common law includes those principles, usages and rules of action applicable to the government and security of persons and property, which do not rest for their authority upon any express and positive declaration of the will of the Legislature.'

"As it does not rest on any statute or other written declaration of the sovereign, there must as to each principle thereof be a first statement. Those statements are found in the decisions of Courts, and the first statement presents the principle as certainly as the last. Multiplication of declarations merely adds certainty. For after all, the common law is but the accumulated expressions of the various judicial tribunals in their efforts to ascertain what is right and just between individuals in respect to private disputes. As Congress cannot make compacts between the States, as it cannot, in respect to certain matters, by legislation compel their separate action, disputes between them must be settled either by force or else by appeal to tribunal empowered to determine the right and wrong thereof. Force, under our system of Government, is eliminated. The clear language of the Constitution vests in this Court the power to settle those disputes. We have exercised that power in a variety of instances, determining in the several instances the justice of the dispute. Nor is our jurisdiction ousted; even if Kansas and Colorado are States sovereign and independent in local matters, the relations between them depend in any respect upon the principle of international law. . . .

"And in delivering the opinion on the demurrer in this

case, Chief Justice Fuller said (185 U. S. 146): 'Sitting as it were as an international, as well as a domestic tribunal, we apply Federal law, State law, and international law, as the exigence of the particular case may demand.'

"One cardinal rule underlying all the relations of the States to each other, is that of equality of right. Each State stands on the same level with all the rest. It can impose its own legislation on no one of the others and is bound to yield to none. Yet whenever, as in the case of *Missouri vs. Illinois*, 180 U. S. 208, the action of one State reaches through the agency of natural laws into the territory of another State the question of the extent and the limitations of the rights of the two States becomes a matter of justiciable dispute between them, and this Court is called upon to settle that dispute in such a way as will recognize the equal rights of both and at the same time establish *justice* between them. In other words, through these successive disputes and decisions this Court is practically building up what may not improperly be called *interstate common law*." (Italics ours.)

The opinion of the Court shows that while the Court will look to the established principles of the law applicable to individuals for guidance, yet in dealing with the broader interest of States and their people they must look equally to the essential *right* and *justice* of the case. The result reached in the case was in accordance with this method, for in deciding it, the Court took into consideration the conditions in the two States as they had been brought about by the use of the waters in dispute and the benefit or detriment which would result to one or the other of the States by a change in the existing situ-

ation. After this comprehensive survey of all the various phases of the case, the Court decided that under all the circumstances as it was then presented the *status quo* should not be disturbed. It dismissed the bill of the State of Kansas, without prejudice, however, to its rights to institute a new proceeding, should it thereafter appear that through a material increase in the depletion of the waters of the Arkansas by Colorado, its corporations or citizens, the substantial interest of Kansas should be injured to the extent of destroying the equitable apportionment of the benefits between the two States resulting from the flow of the river.

It will be seen from these opinions of the Supreme Court that there is no great difficulty in determining whether a given controversy is or is not justiciable. These cases make clear two things: First, the comprehensive character of the judicial power vested in the Court with regard to controversies between two or more States. It includes every such controversy without any exception.

The question of jurisdiction, strictly speaking, can therefore never arise.

Gentlemen, you see that you cannot find anywhere any limitation such as has been suggested, based on the theory that some controversies between States involve political questions and some do not. The nearest approach to a holding of that kind was the recent case of the State of Oregon vs. the Pacific Telephone and Telegraph Company, in which that company refused to pay some taxes imposed by the Legislature of Oregon, on the theory that those taxes were illegally imposed; on the ground that

the Legislature of Oregon having been elected under the new Constitution which provided for the initiative and referendum, did not constitute a republican form of government; that the word "republican" as used in the Constitution, the form of government known as republican, guaranteed to every State by the Constitution, meant representative government, it did not mean democracy in the extreme sense of the word; that the people who organized this great country never dreamed of establishing a democracy, there was nothing they dreaded worse than democracy, nothing they thought more dangerous than unrestrained, unlimited, uncontrolled democracy; they had not read any page of history, they had not a record in all history, of any effort to establish a democracy, the direct governing of the people by themselves, without the aid of any representation, which had not absolutely failed and vanished from the earth.

And the argument was a powerful one, to the effect (or could have been made, at any rate, to the effect) that what the framers of the Constitution of the United States meant by a republican form of government, never could have been anything except representative government as distinguished from direct, popular government. The Supreme Court of the United States held, however, that that was a political question; that they had to assume that Oregon was a State, because they had no power to determine the question as to whether it was a State or not. That was a question for the political department of the Government to determine, the Executive and Legislative branch.

For instance, if Congress admitted the representatives

of Oregon into its membership, as members, or into the Senate, that is a matter for them to decide, not the Court.

But that does not militate against the proposition with which we started out, that all controversies between the States are justiciable in the Supreme Court of the United States. That was not the question, as to whether a controversy between the States was justiciable, but the question there was whether Oregon was a State at all, and they could not pass on that question.

Secondly, these cases establish that the court will administer, in deciding such controversies, the appropriate law of the case, this law including the great principles of enlightened justice, as well as the fixed and narrow rules of law and equity or the broader and more liberal principles of international law.

From these principles it would appear that whether or not a given controversy is justiciable is more a question of fact than one of law. When you have determined that two States are asserting an adverse claim one against the other upon a matter where their *authority, rights or interests* as a State are concerned, then such a controversy is a justiciable one. I put the qualification that the "authority, rights or interests" of the States must be involved, because this is necessary in order that an *actual* controversy shall exist, as distinguished from a mere abstract difference of opinion upon general questions with which States as States are not concerned.

As to the "authority and rights" of a State used in connection with controversy, I believe their purport will be sufficiently clear from what I have already said. The boundary disputes which have been decided by the

Court and the dispute in the Colorado case illustrate controversies involving authority and rights in their broad and general sense. But the term "interest" may require a moment's further comment.

It is possible that there may be no direct dispute as to authority, or as to right in even a most liberal judicial sense, and still an act may be done or permitted by one State which directly affects the substantial interest of another State.

The case of *Georgia vs. Tennessee Copper Company* (206 U. S. 230) was such an instance. These certain copper Companies located in Tennessee near the Georgia boundary, discharge from their plants certain noxious gases over into the territory of the State of Georgia, which it was alleged resulted in a wholesale destruction of forests, orchards and crops and in other injuries in some five counties of that State. It was not asserted that the State of Georgia owned any of the property which was alleged to be so destroyed, and the suit was brought in its sovereign capacity for the protection of the interest of its people. It was denied by the Copper Company that the State had any right to maintain suit in such a case. The Court held, however, that although the elements which would form the basis of relief between private parties were wanting, the States could maintain the suit for injury in a capacity as *quasi*-sovereign, in which capacity it has an interest independent of and behind its citizens in all the earth and air of its domain. It is true this was not a suit between two States, but the principle must be the same. For it appeared in the case that the State of Georgia had made representation to

the State of Tennessee regarding the nuisance and had requested its abatement by that State. It was upon default of satisfactory compliance by it that the State of Georgia brought the suit against the individual corporations. It is difficult to see any ground upon which in such a case the action could not have been equally maintained against the State of Tennessee itself.

Mr. Justice Holmes, delivering the opinion, said:

"But it is plain that some such demands must be recognized, if the grounds alleged are proved. When the States by their Union made the forcible arbitrament of outside nuisance impossible to each, they did not thereby agree to submit to whatever might be done. They did not renounce the possibility of making reasonable demands on the ground of their still remaining *quasi*-sovereign interests; and the alternative to force is a suit in this Court." (page 237.)

And further:

"It is a fair and reasonable demand on the part of a sovereign that the air over its territory should not be polluted on a great scale by sulphurous acid gas, that the forests on its mountains, be they better or worse, and whatever domestic destruction they have suffered should not be further destroyed or threatened by the act of persons beyond its control, that the crops and orchards on its hills should not be endangered from same source."

It is manifest, of course, that such claims on the part of a State may be pressed to an unreasonable extreme, and that great caution is necessary on the part of the Court in giving recognition to them. This was pointed out by the Supreme Court in the case of *Missouri vs.*

Illinois, 200 U. S., 496, where the Court refused, upon a review of the evidence, to enjoin the State of Illinois from discharging sewerage into the Illinois River upon the claim of the State of Missouri that such discharge polluted the water of the Mississippi River, rendering it unfit to drink and productive of typhoid fever; that Court not finding that the evidence proved the allegations of the bill.

I will not pursue this branch of the subject further, as it is manifest from the almost infinite number of ways in which one State's interest may be affected directly or indirectly by the action of another State or by forces or causes having their origin in another State, that no accurate definition can be framed which would include all those instances which would give a right to relief. Each case will depend on its own facts, and will be decided in view of all the important considerations which affect the harmonious relations of the States.

In this case Kentucky had made demand upon the Governor of Ohio for the delivery of one Lago who, it was alleged, had committed an offence in the State of Kentucky and fled from that State to the State of Ohio. This demand of the State of Kentucky was made in pursuance of that clause of the Constitution of the United States which provides that—

“A person charged in any State with treason, felony or other crime, who shall flee from justice and be found in another State, shall on demand of the Executive authority of the State from which he fled, be delivered up to be removed to the State having jurisdiction of the crime.”

The Governor of Ohio upon whom the demand was

thus made refused to comply with it, upon the ground that the crime with which Lago was charged in Kentucky (enticing a slave from its master) was not an offence within the contemplation of the Constitution, depending as it did for its existence solely upon the peculiar law of the demanding State.

Upon such refusal, the State of Kentucky filed an original proceeding in the Supreme Court of the United States asking for a *mandamus* against Dennison, the Governor of Ohio, requiring him to deliver up the demanded fugitive, as it was his constitutional obligation to do.

In passing upon the case, the Court held, Chief Justice Taney delivering the opinion, that the suit was in reality a suit between the States of Kentucky and Ohio, and that the Supreme Court clearly had jurisdiction over the controversy. The Court also said that if any remedy could be granted, *mandamus* was the proper one. It went on then to say that the State of Kentucky had complied with all the requirements of the Act of Congress passed for the enforcement of the constitutional provision under consideration; that the case was one clearly covered by the Constitution, and that it was the duty of the State of Ohio to discharge the obligation clearly placed here by the Constitution by delivering up the demanded fugitive.

But upon the question of the Court's power to enforce this obligation, the opinion has this to say:

"The demand being thus made, the Act of Congress declared that it shall be the duty of the Executive authority of the State to cause the fugitive to be arrested and secured and delivered to the agent of the demanding

State. The words 'it shall be the duty' in ordinary legislation imply the assertion of the power to command and to coerce obedience. But looking to the subject matter of this law and the relations which the United States and the several States bear to each other, the Court is of opinion the words 'it shall be the duty' were not used as mandatory and compulsory, but as declaratory of the moral duty which this compact created, when Congress had provided the mode of carrying it into execution. The Act does not provide any means to compel the execution of this duty, nor inflict any punishment for neglect or refusal on the part of the Executives of the State; nor is there any clause or provision in the Constitution which arms the Government of the United States with this power. Indeed, such a power would place every State under the control and dominion of the General Government, even in the administration of its internal concerns and reserved rights.

"And we think it clear that the Federal Government, under the Constitution, has no power to impose on a State Officer, as such, any duty whatever, and compel him to perform it; for if it possessed this power, it might overload the officer with duties which would fill up all his time and disable him from performing his obligations to the State, and might impose on him duties of a character incompatible with the rank and dignity to which he was elevated by the State."

After the decision in *Rhode Island vs. Massachusetts*, it is indeed curious to find the Court unanimously agreeing upon the doctrine laid down by the Chief Justice in the *Kentucky* case.

The Chief Justice dissented from the opinion in the Rhode Island case, upon the ground that the judicial power of the United States did not include the power to decide a contest involving the sovereignty and jurisdiction of a State; that such a question was a political and not a judicial one.

But as that case expressly decided that such a case *was* cognizable by the Court, and as the Court had later in 4 Howard actually passed judgment in the case, and adjudicated that Rhode Island's claim of jurisdiction and sovereignty to the territory in dispute was unfounded, and thus established judicially the rights of Massachusetts, it is difficult to see how the Court could hold, after doing all this, that in a case where its judicial power was undoubted that it could not exercise or give effect to such judicial power, merely upon the ground that it could not coerce a State Officer.

When a boundary dispute is decided, the whole power of the State and every Officer of the State is directly dealt with and coerced, because its judgment is binding on the State and upon all its representatives.

Such a boundary decision is based ordinarily upon mere general rules of law accepted and recognized by the Court as the means of disposing of controversies within the scope of the judicial power vested in the Supreme Court by the States. But in the Kentucky case, not only was the jurisdiction over the controversy with Ohio clearly within the jurisdiction of the Court, as it in fact expressly held it was, but the same instrument which conferred this jurisdiction went further in the particular case and established the substantive obligation of

one of the parties to such a controversy. *In other words, in addition to granting the power to decide such a case, the rule of decision itself was provided by the Constitution.*

When, therefore, the Chief Justice, speaking for the Court, said that a State Officer could not be coerced, he would have to say at the same time that a State could not have a judgment or decree of the Supreme Court rendered or enforced against it at all. But the latter proposition, as we have seen, was decided to the contrary in the Rhode Island case.

The truth would certainly seem to be that as the States have, by consent under the Constitution, submitted their controversies to the Supreme Court for decision, they have waived all immunity as sovereigns, insofar as the decision of such controversies and the enforcement thereof are concerned. And thus in *Kentucky vs. Dennison*, as the States had solemnly assumed an obligation under the Constitution to deliver up fugitives from justice, and had given the power to the Supreme Court to decide all controversies between them, the refusal of the State of Ohio to comply with its obligation subjected that State and all its Officers to the jurisdiction and control of the Supreme Court, for the purpose of having the controversy decided and for the purpose of the enforcement of the decision rendered. The complete answer to the argument that to so hold would be to invade the sovereignty of the States is that by the plain language of the Constitution, the States have agreed to such an invasion in this particular case.

The truth of the matter is that if it was not intended by the Constitution to authorize a Federal Government

to compel a State to discharge so simple a duty as that of returning a fugitive from justice, it is incredible that it could have been intended by that same Constitution to authorize a Federal Government to compel a State by force of arms to remain a member of the Union from which it had undertaken to secede, and that too, even assuming that the State never had any Constitutional right to secede.

It may be observed that in the litigation between States, which it has had under consideration since the Civil War, noticeably in the protracted and still pending litigation between the States of Virginia and West Virginia, touching the question of the liability of West Virginia for a share of the original State debt, the Supreme Court has not manifested any marked tendency to adhere to the conclusions reached in *Kentucky vs. Dennison*.

For the purposes of the present occasion, however, it seems to me that the most important point to be noted is this:

If the Supreme Court of the United States is to be taken as a pattern for an International Court of Justice, unless it shall be otherwise provided in its Constitution, such an International Court will naturally have and assume to exercise the right to determine its own jurisdiction, i.e., to determine for itself what questions—what controversies—between contending nations shall be deemed to be justiciable.

But if the International Court shall follow the precedent established by its prototype, it will naturally hold that *all* controversies between nations which will involve

in any material degree the substantial rights, interests or authority of the contending bodies, will be deemed to be justiciable.

That questions which have always heretofore been deemed to be political in their character will have been withdrawn from the sphere of international politics and become judicial.

It will, therefore, be manifestly necessary for the people of the United States before becoming parties to any League or Compact having for its purpose the establishment of such an International Tribunal, either to see to it that that Tribunal will be precluded by its Constitution from undertaking to decide any question which we would not be willing to have others decide for us, or else make up our minds definitely to accept the proposition that there is and can be no such question: that even though the controversy between ourselves and some foreign power might be one upon the issue of which would depend our continued existence as an independent nation or any right to continue to enjoy the blessing of civil and religious liberty, we would be willing to leave the decision to this human Tribunal rather than appeal as of yore to the God of Battles.

When we shall have reached that conclusion, it will be because we have concluded that there is nothing left in this world worth fighting for.

When that comes to be true, it will be equally true that there is nothing worth living for.

So long as there is a spark of the old spirit, or a drop of the old blood left in them, the American people will never accept such a doctrine.

Nevertheless the number of controversies which could be adjudicated by such a Court and the number of wars which could thereby be prevented is so great that it cannot be doubted that its establishment would be one of the greatest blessings ever conferred upon mankind.

THE PRESIDING OFFICER: May I beg to assure Mr. Marbury that the Society does not believe that the mere existence of a court will change human nature. Mr. Ellsworth, in convention (later Chief Justice) said: "If the States want to fight there is no instrument that will prevent them from so doing." But the concession which Mr. Marbury makes that in very, very many cases the decision of questions of dispute between nations by judicial process will prevent many wars—and if, indeed, a Court of this kind could, if established, prevent but a single war, this Society would be justified in existing and continuing its agitation.

And, finally, the very reason which Mr. Marbury advances against the court is the very reason which many of us would advance as justifying its existence, namely, that it can take jurisdiction of questions, and adjust them judicially, leaving to the good sense, and the proposition of the justice of the case, the execution of the judgment, without a power to compel its execution against a sovereign State.

We have had some seventy odd decisions in disputes between States, and with but an exception or two all have been complied with. Therefore we are content to leave the execution of the judgments, as the Supreme Court itself has left the execution, to the reasonableness of the judgment and the views advanced in deciding the case.

It is my very great privilege to call upon Mr. Penfield to discuss the question, "In What Classes of Subjects Can a State Sue Another in the Supreme Court?"

IN WHAT CLASSES OF SUBJECTS CAN A STATE SUE ANOTHER IN THE SUPREME COURT?

WALTER S. PENFIELD

Paragraph 2, of section 2, of Article III of the Constitution of the United States provides that in all cases in which a State shall be a party, the Supreme Court shall have original jurisdiction.

Paragraph 1, of said section and article, states that the Judicial Power is extended to controversies between two or more States.

Dr. Miller, formerly Associate Justice of the Supreme Court of the United States, in his lectures on the Constitution of the United States, says:

"The judicial power is extended to controversies between two or more States. There has never been a tribunal known in history, anterior to the formation of this Constitution, which had jurisdiction, in the full sense of that word, of controversies between States. The old Amphictyonic Council among the Greeks might possibly have been called a court or tribunal in some sense, but certainly not in the broad way in which the term is applied to the Supreme Court of the United States. That Council could meet and hear the complaints of the Greek States against each other, and in that forum they could complain of each other's acts. Upon such hearing the Council could recommend what could be done, but it

had no power to carry its determinations into effect. The Constitution of the United States, however, creates a court which can only hear and determine all controversies between different states, of which it is given original jurisdiction, but can also bring them before it by process, as it can bring the humblest citizen, and declare its judgment, which it has usually been able to enforce."

Nothing is said in the Constitution in regard to the class of controversies between the States over which the Judicial Power shall extend. But this question was passed upon in the case of *Rhode Island vs. Massachusetts*, number 12 Pet., 657, where it was held that although the Constitution does not, in terms, extend the Judicial Power to all controversies between two or more States, it, in terms, excludes none, whatever may be their nature or subject.

Judge Cooley, in his work on the *Principles of Constitutional Law*, says:

"Many questions might arise under this clause concerning the reach of the federal jurisdiction over controversies between States, the subjects that may be dealt with and determined, and how far the sovereign rights of the States, and the extent of their respective territorial jurisdictions, may be brought within the cognizance and final determination of the federal judiciary. This clause conferring jurisdiction of such controversies is general, and only as cases arise can it be determined whether they present questions which are properly of judicial cognizance as between the States. A question of boundary is plainly such a question, and so is the question whether the conditions in a compact between

two States, on the performance of which certain territory was to be detached from the one and become a part of the other, have ever been complied with, so as to effect the transfer."

It is interesting to examine some of the controversies to which the States of the Union have been parties.

1. IN PREVENTING THE POLLUTION OF WATER-COURSES

In the case of *Missouri vs. Illinois*, number 180 U. S., 208-219, it was held that:

"The acts of one State in seeking to promote the health and prosperity of its inhabitants by a system of public works, which endangers the health and prosperity of the inhabitants of another and adjacent State, create a sufficient basis for a controversy, in the sense of the Constitution, and the Supreme Court has jurisdiction of a bill for an injunction."

2. IN PREVENTING UNREASONABLE USE OF THE WATERS OF A STREAM

It has been held, in *Kansas vs. Colorado*, number 185 U. S., 125, and *Kansas vs. Colorado*, number 206 U. S., 46, that the Supreme Court has original jurisdiction of a suit by one State against another to enjoin the latter from using waters of a river which flows through both states in such quantities as to be detrimental to the lives of the former.

3. IN SUITS FOR RECOVERY OF DEBTS AND FOR ACCOUNTING

One of the most important cases that has been before the Supreme Court is one in regard to a suit for the re-

covery of debts and for accounting on the part of the State of Virginia *vs.* West Virginia. This case has appeared several times in the Supreme Court. It was a suit against West Virginia to compel her to assume and pay a just proportion of the public debt of the State of Virginia existing at the time of the separation of the two States.

It was contended that the Supreme Court had no jurisdiction because of the compact entered into between the States by which the question of the liability of West Virginia was to be submitted to the arbitrament and award of the Legislature of West Virginia as the sole tribunal which could pass upon it. It appeared that the ordinance of Virginia providing for the formation of a new State declared that the new State should take upon itself a just proportion of the public debt then existing, and that the Constitution of West Virginia, when admitted into the Union, provided for the assumption by that State of an equitable proportion of the public debt, to be ascertained by the legislature as soon as practicable.

It was held that the jurisdiction was not defeated by the compact, and that it well might be inquired why, in the forty-three years that elapsed after the compact was made, West Virginia had taken no steps to comply with it.

When the same case again appeared in the Supreme Court, it was evident that the Court hoped that the parties to the controversy would, by conference, come to a friendly settlement of their dispute. But such was not the case; for the matter again came up for decision last year, when a final decree was ordered stating the

amount of money which West Virginia's share of the debt would be.

The case again came up for hearing, Virginia having petitioned for a writ of execution on the ground that such relief was necessary as the latter had taken no steps whatever to provide for the payment of the decree. But the Supreme Court did not grant the motion because it appeared that the State of West Virginia had no power within herself to pay the judgment in question except through the Legislative Department of her Government, that she should be given an opportunity to accept and abide by the decision of the Court, and, in the due and ordinary course, to make provision for its satisfaction before any steps looking toward her compulsion were taken, and that to issue an execution at this time would deprive her of such opportunity because her Legislature has not met since the rendition of said judgment and will not again meet in regular session until the second Wednesday in January, 1917, and the members of that body have not yet been chosen.

4. SUITS TO ENFORCE STATE BONDS

The Supreme Court has jurisdiction of controversies on suits to enforce state bonds. It has been held that where bonds have been issued by one State in aid of a railroad and said bonds afterwards come into the hands of another State, the latter may sue thereon in the Supreme Court although the bonds were donated to the complainant for the purpose of giving the Supreme Court jurisdiction.

In *South Dakota vs. North Carolina*, number 192 U. S., 282-312, it was held that:

"Obviously that jurisdiction is not affected by the fact that the donor of these bonds could not invoke it. The payee of a foreign bill of exchange may not sue the drawer in the federal court of a State of which both are citizens, but that does not oust the court of jurisdiction of an action by a subsequent holder if the latter be a citizen of another State. The question of jurisdiction is determined by the status of the present parties, and not by that of prior holders of the things in controversy. Obviously, too, the subject matter is one of judicial cognizance. If anything can be considered as justiciable, it is a claim for money due on a written promise to pay, and if it be justiciable, does it matter how the plaintiff acquires title, providing it be honestly acquired? It would seem strangely inconsistent to take jurisdiction of an action by South Dakota against North Carolina on a promise to pay made by the latter directly to the former, and refuse jurisdiction of an action on a like promise made by the latter to an individual and by him sold or donated to the former."

5. CONTROVERSIES AS TO BOUNDARIES

The Supreme Court has original jurisdiction, under the Constitution, of controversies between States of the Union concerning their boundaries. And this jurisdiction is not defeated because in deciding the question of boundary it is necessary to consider and construe contracts and agreements between the States, nor because

the judgment or decree of the Court may affect the territorial limits of the jurisdiction of the States that are parties to the suit.

An examination of the decisions of the Supreme Court discloses that the highest tribunal of the country has many times passed on boundary disputes that have arisen between the different States. Such controversies have existed between Virginia and West Virginia, New Jersey and New York, Rhode Island and Massachusetts, Florida and Georgia, Missouri and Iowa, Alabama and Georgia, Missouri and Kentucky, Iowa and Illinois, Louisiana and Texas, Louisiana and Mississippi, Virginia and Tennessee, Missouri and Nebraska, Indiana and Kentucky, Maryland and West Virginia, North Carolina and Tennessee, and Washington and Oregon.

In *Virginia vs. Tennessee*, number 148 U. S., 503, it was held that:

"In this respect the judicial department of our Government is distinguished from the judicial department of any other country, drawing to itself by the ordinary modes of peaceful procedure the settlement of questions as to boundaries and consequent rights of soil and jurisdiction between States, possessed for purposes of internal government, of the powers of independent communities, which otherwise might be the fruitful cause of prolonged and harrassing conflicts."

In *Rhode Island vs. Massachusetts*, number 12 Pet., 657, it was held that:

"There is neither the authority of law or reason for the position that boundary between nations or states is, in its nature, any more a political question than any

other subject on which they may contend; none can be settled, without war or treaty, which is by political power; but, under the old and new confederacy, they could and can be settled by a court constituted by themselves, as their own substitutes, authorized to do that for states, which states alone could do before."

The Supreme Court does not act differently in deciding on boundaries between States than on lines between separate tracts of land. If it is uncertain where the line is, if there is a confusion of boundaries, the obliteration of marks, or the effects of accident, fraud, or time, it is a case for the Court to consider. An issue at law is directed and a commission of boundary awarded; or, if the Court is satisfied, it decrees what and where the boundary of a farm or State is and shall be. Where there is a bill and cross-bill, each State is a defendant, and the Court can pass such a decree as the case requires.

When Rhode Island *vs.* Massachusetts was before the Court at a subsequent term, Chief Justice Taney, after stating that the case was of peculiar character, involving a question of boundary between two sovereign States litigated in a court of justice, and that there were no precedents as to forms and modes of proceedings, said:

"The subject was, however, fully considered at the January term, 1838, when a motion was made by the defendant to dismiss this bill. Upon that occasion the Court determined to frame their proceedings according to those which had been adopted in the English Courts, in cases most analogous to this, where the boundaries of great political bodies had been brought into question. And, acting upon this principle, it was then decided that

the rules and practice of the Court of Chancery should govern in conducting this suit to a final issue. The reasoning upon which that decision was founded is fully stated in the opinion then delivered; and, upon reëxamining the subject, we are quite satisfied as to the correctness of this decision."

(*Rhode Island vs. Massachusetts*, number 14 Pet., 210, 256; No. 10 L. Ed., 423).

In suits between two States the Supreme Court has exclusive original jurisdiction even in the absence of any Act of Congress regulating the mode and form in which it shall be exercised. The mere fact that a State had no pecuniary interest in the controversy would not defeat the original jurisdiction of the Supreme Court, which might be invoked by the State as parents partial, trustee, guardian, or representative of all or a considerable portion of its citizens.

Sometimes a controversy arises which appears to be between two States but which does not likely fall within that category. An absolute transfer or gift of the subject of the cause of action to a State does not defeat the original jurisdiction of the Supreme Court of suits between States, notwithstanding the fact that the motive of the transfer was to give the Supreme Court jurisdiction.

It was held in *New Hampshire vs. Louisiana* and *New York vs. Louisiana*, number 108 U. S., 76, that a State which is indebted to a citizen of another State cannot be sued upon such demand by the State whereof the creditor is a citizen. One State cannot, in this matter, create a controversy with another State. Nor is a State an independent nation clothed with authority and power to make

an imperative demand upon a sister State for the payment of debts due to the citizen of the former from the latter.

And it seems that a case which belongs to the jurisdiction of the Supreme Court, on account of the interest a State has in the controversy, must be one in which the State is either nominally or substantially the party.

Thus it can be seen that:

"In order to maintain jurisdiction of a suit between two States, it must appear that the controversy to be determined is a controversy arising directly between them, and not a controversy in vindication of the grievances of particular individuals."

In *Louisiana vs. Texas*, 176 U. S., 16, the Court said:

"The references we have made to the derivation of the words 'controversies between two or more States' manifestly indicates that the framers of the Constitution intended that they should include something more than controversies over 'territory or jurisdiction,' for in the original draft as reported the latter controversies were to be disposed of by the Senate, and controversies other than those by the judiciary, to which by amendment all were finally committed. But it is apparent that the jurisdiction is of so delicate and grave a character that it was not contemplated that it would be exercised save when the necessity was absolute and the matter in itself properly justiciable;" and that in order that a controversy between States, justiciable in the Supreme Court of the United States, can be held to exist, something more must be put forward than that the citizens of one State are injured by the maladministration of the laws of another. "When there is no agreement

whose breach might create it, a controversy between States does not arise unless the action complained of is State action, and acts of State Officers in abuse or excess of their powers can not be laid hold of as in themselves committing one State to a distinct collision with a sister State."

It is thus seen that while the Constitution of the United States does not expressly specify the subjects in which one State can sue another, nevertheless the Supreme Court has held that although the Constitution does not, in terms, extend the judicial power to all controversies between two or more States, it, in terms, excludes none, whatever may be their nature or subject. The Supreme Court appears to have assumed jurisdiction of such controversies between States as have been brought before it, and it is reasonable to presume that it may assume jurisdiction of all classes of subjects, under proper limitations, that may arise between States, just as it assumes jurisdiction of all classes of controversies, under certain limitations, that arise between individuals.

One of the principal objects of this Conference is to show that if the Supreme Court of the United States can assume jurisdiction over controversies between the States of the Union and settle them in a friendly manner, without the necessity of resorting to arms, then there is no reason why an international court can not be established which may be given jurisdiction to pass upon all controversies, under certain limitations, that may arise between the different countries of the world and settle them in a friendly manner, without the necessity of causing unnecessary warfare and bloodshed.

It is to be hoped that after the great conflagration that is now devastating Europe has terminated, the nations of the world may again assemble at The Hague and reach an agreement for the formation and establishment of a court which shall sit permanently and which shall have jurisdiction of all controversies, and the decrees of which will be promptly complied with and obeyed by the parties litigant. Thus will the hope of ages be attained, an end will be made to warfare, and a further step will be taken in the direction of a higher development of the international consciousness.

THE PRESIDING OFFICER: We have been suffering, as one might say, from an excess of reason, from an embarrassment of riches. We cannot however consider ourselves as satisfied, and cannot proceed to adjourn, until we have heard from our good friend, Mr. Hull, who will address you upon the question, "How does the Supreme Court endeavor to obtain presence of defendant State?—Professor Hull.

CAN THE SUPREME COURT COMPEL APPEAR- ANCE OF DEFENDANT STATE?

WILLIAM I. HULL

Mr. Chairman, and gentlemen, at this prandial hour—indeed, I think I may call it this post-prandial hour, in view of the very rich feast of food for thought that we have had presented to us this morning—I will not venture to ask for the prolonged indulgence of this most patient and courteous audience.

I observe that in my telegraphic correspondence with the Committee on Program for this meeting, I have misunderstood their request, and have written a paper on the seventh instead of the sixth question, namely, "Can the Supreme Court compel the appearance of a Defendant State?" [Mr. Hull then presented, within a few minutes and orally, the substance of his paper, which is as follows.]

NO POLICE OR MILITARY POWER TO COERCE A STATE

This question, so far as physical force is concerned, may be readily answered. The Supreme Court of the United States neither possesses, nor attempts to procure and exercise, physical force, in the shape of either a military or a police power, for the purpose of compelling a defendant state to appear before it.

No foreign state can be compelled, of course, to become a party, either as plaintiff or as defendant, in any of our American tribunals. It is by consent alone that a foreign state ever appears in our courts, and by its consent alone that the jurisdiction of the court is given effect.¹

The United States, in the second place, cannot, without its own consent, be made a defendant in any suit or judicial proceeding in our courts, whether they be federal or state; while it may, of course, on its own volition, institute proceedings against an individual or a state in any proper court. The necessity for the consent of the United States, as a prerequisite to judicial proceedings, has been asserted on the ground that the United States, like foreign states, is a "complete and independent sov-

¹ Story's *Commentaries* III 570.

ereignty," and would have its sovereignty impugned by compulsory process of any of its courts. But the federal judiciary is a constituent part of this "complete and independent sovereignty;" hence, by obeying the summons of the Supreme Court, the United States would no more impugn its sovereignty than would the obedience of a man's hands to the summons of his brain detract from his personal rights and dignity. The real reason why the Supreme Court would refuse, and properly refuse, to attempt a compulsory summons of the United States, is because the President and Attorney General, whom it would naturally summon as representatives of the United States, are of the Executive Department, which was made by the Constitution independent of and coordinate with the judiciary. Even though the Court should put aside this reasoning, it would be under the practical necessity of refraining from such compulsory summons, since it possesses no means of exercising constraint over the Executive Department of the government. It is altogether probable that the President could not be compelled to appear before the Supreme Court in obedience to a writ of subpoena, even as a witness, in a suit to which the United States is or is not a party. Chief Justice Marshall's writ served on President Jefferson in the trial of Aaron Burr was frankly rejected by the President, and the question has never been pressed to an issue.

The States of the American Union, in the third place, are on the same plane as is the United States or a foreign state, so far as the enforcement of a summons by the Supreme Court is concerned. The Eleventh Amendment

to the Constitution, although it required the consent of a State before it could be sued in the federal courts by a *citizen* of another State or a foreign state, left the States suable *without* their consent, in the federal courts, by the United States or by another State. But, although the Supreme Court will accept jurisdiction over suits brought by the United States or another State against a State, even without that State's consent,¹ it would not attempt to compel the presence of a State before it. The Supreme Court has itself decided that when process at common law or in equity is to issue from the Court against a State, the process is to be served upon both the Governor and the Attorney General of the State.² But these representatives of a State cannot be compelled to obey the summons and accept the suit in the name of the State; they cannot be compelled to appear in court even as a witness and testify in relation to matters pertaining to the exercise of their official functions; nor can they be constrained by a grand jury's attachment to disclose official affairs which, in their discretion, they deem it inexpedient to reveal.

If the legally responsible representatives of the State refuse or neglect to appear before the Supreme Court, upon due service of process, no coercive measures are taken to compel their appearance; but, on the other hand, the plaintiff State is allowed to proceed with the suit *ex parte*.³

¹ U. S. vs. N. C., 136 U. S. 211, 10 Sup. Ct. 920; R. I. vs. Mass., 12 Peters 657.

² N. J. vs. N. Y., 5 Peters 284; Grayson vs. Va., 3 Dall. 320; Huger vs. S. C., 3 Dall. 339.

³ N. J. vs. N. Y., 3 Peters 461; N. J. vs. N. Y., 5 Peters 284; Mass. vs. R. I., 12 Peters 755.

It has been the practice of the Supreme Court, when State tribunals have refused or neglected to prepare and certify the record of the case that is to be appealed or removed to the Court, to proceed as if the state tribunals had performed their duty; jurisdiction has been taken in such cases, and judgments duly rendered, even though the States have made remonstrance or attempted resistance. The same course is pursued when the proper State officials refuse or neglect to respond to the Supreme Court's summons to the State to appear. The case is carried through to a judgment in just the same way as if both parties were present; but no attempt is made by or in the name of the Supreme Court to enforce either summons or judgment. For the Supreme Court possesses no military force by which to coerce a State; and even its police power, as represented by United States marshals, extend, only to individuals, and not to States. This is true even when the United States itself appears as a suitor before the Court against a State, and not merely when another State or an individual citizen appears as the suitor.

The Supreme Court has itself decided that it has no constitutional right even to attempt to coerce public officers by a writ of mandamus. In the great case of *Marbury vs. Madison*,⁸ chiefly famous for asserting the right of the judiciary to pass upon the constitutionality of acts of Congress, Chief Justice Marshall declared:

⁸ Cp. the Supreme Court of Wisconsin and the case of *Alleman vs. Booth*, 21 How. 506.

⁹ Cranch, 137 Cp. Cooley, *Constitutional Law*, 2d ed., p. 110, notes 3 and 4, and *Constitutional Limitations*, 6th ed., p. 136, note.

"The authority, therefore, given to the Supreme Court, by the act establishing the judicial courts of the United States, to issue writs of mandamus to public officers appears not to be warranted by the Constitution."

THE APPARENT HELPLESSNESS OF THE SUPREME COURT

Such is the apparent helplessness of the Supreme Court of the United States before the task of compelling the attendance of a State before it. But its apparent helplessness goes much farther than this. Although the power of the federal judiciary is defined and granted by the Constitution itself, and not by mere congressional enactment, and is made independent of and coördinate with the executive and legislative departments, still it was not made self-executing; that is to say, it could not come into operation until the Congress had made provisions for the organization of the Supreme Court and the number of its judges, and until the President had appointed its judges, by and with the advice and consent of the Senate. Moreover, it could not at the beginning, nor can it yet, operate until a concrete "case" is presented for its action; that is, until "parties" come knocking at its door with an assertion of rights or a suit for the redress of wrongs. Again, the Congress in organizing the Supreme Court, and in creating the inferior federal courts, did not fill the entire field of judicial power marked out by the Constitution. In fact, much of the judicial power which might be made exclusive in the federal courts still remains concurrent in the state courts. When the Supreme Court ventured to entertain

a suit against a State, without that State's consent,⁷ it was checked by the Eleventh Amendment; and since the adoption of that amendment, which requires the State's consent to be sued by the citizen of another State or a foreign state, the Court has itself decided that a State cannot be sued in a federal court, without its own consent, by one of its own citizens;⁸ and, further, that admiralty courts can take no cognizance of a suit by an individual against a State, without that State's consent.

With these restrictions on the operation and jurisdiction of the Supreme Court, its most surprising defect, in the eyes of most people in these rampantly military days, is its lack of any police or military power for the enforcement of its summons or its decisions, so far as States as parties are concerned. The Constitution, or the Congress in its organization of the Court, might conceivably have conferred, or attempted to confer, this power upon it; but this was not done, for the good and sufficient reason that it would have been an ominous preparation for civil war.

The apparent helplessness of our great and majestic supreme tribunal is graphically portrayed by Alexander Hamilton in the following words:⁹ "Whoever attentively considers the different departments of power must perceive that, in a government in which they are separated from each other, the judiciary, from the nature of its functions, will always be the least dangerous to the political rights of the Constitution; because it will be least

⁷ *Chisholm vs. Ga.*, 2 Dall. 419.

⁸ *Hans vs. La.*, 134 U. S., 1.

⁹ *Federalist* (No. 78).

in a capacity to annoy or injure them. The Executive not only dispenses the honors, but holds the sword of the community. The legislature not only commands the purse, but prescribes the rules by which the duties and rights of every citizen are to be regulated. The judiciary, on the contrary, has no influence over either the sword or the purse, no direction either of the strength or of the wealth of the society; and can take no active resolution whatever. It may truly be said to have neither *force* nor *will*, but merely judgment; and must ultimately depend upon the aid of the executive arm even for the efficacy of its judgments.

"This simple view of the matter suggests several important consequences. It proves incontestably that the judiciary is beyond comparison the weakest of the three departments of power; that it can never attack with success either of the other two; and that all possible care is requisite to enable it to defend itself against their attacks. It equally proves that though individual oppression may now and then proceed from the courts of justice, the general liberty of the people can never be endangered from that quarter; I mean so long as the judiciary remains truly distinct from both the legislature and the Executive. For I agree that there is no liberty, if the power of judging be not separated from the legislative and executive powers. And it proves, in the last place, that as liberty can have nothing to fear from the judiciary alone, but would have everything to fear from its union with either of the other departments; that as all the effects of such a union must ensue from a dependence of the former on the latter, notwithstanding a

nominal and apparent separation; that as, from the natural feebleness of the judiciary, it is in continual jeopardy of being overpowered, awed, or influenced by its coördinate branches; and that, as nothing can contribute so much to its firmness and independence as permanency in office, this quality may therefore be justly regarded as an indispensable ingredient in its constitution, and, in a great measure, as the citadel of the public justice and the public security."

The great protagonist of the power and dignity of the Supreme Court, Chief Justice Marshall, also gives expression to its apparent helplessness, as follows:¹⁰ "The judicial department has no will in any case. Judicial power, as contradistinguished from the power of the laws, has no existence. Courts are the mere instruments of the law, and can will nothing. When they are said to exercise a discretion, it is a mere legal discretion, a discretion to be exercised in discerning the course prescribed by law; and, when that is discerned, it is the duty of the court to follow it. Judicial power is never exercised for the purpose of giving effect to the will of the judge; but always for the purpose of giving effect to the will of the legislature; or, in other words, to the will of the law."

Hamilton's remark, in the above quotation, that "the judiciary must ultimately depend upon the aid of the executive arm even for the efficiency of its judgments," expresses a view which is still prevalent, and especially prevalent, in the present ultra-military time. Since the President is required by the Constitution to "take care that the laws be faithfully executed," and since the ju-

¹⁰ *Osborn vs. Bank of U. S.*, 9 Wheaton, 738 (R. 866).

diciary is an integral part of the federal government, it does seem natural to suppose that the Court should look to the Executive, and to its military force if necessary, to coerce a reluctant State. In those times and places where the church and the state were united, it was the usual custom for the church to entrust to the state the execution of ecclesiastical decrees when physical force was requisite for such enforcement.

But neither analogy nor the arguments mentioned are relevant in our problem; for, although the full power of the Executive could and doubtless would be used against a delinquent individual, it is not so usable, at least for the enforcement of judicial process, against a reluctant State. It is conceivable that a State would refuse or neglect to perform even duties expressly laid upon it by the Constitution, as, for example, the provision for the election of Representatives, Senators and Presidential Electors.¹¹ The practical reason why the United States would not attempt to compel a State official to perform a federal service, and vice versa, has been stated to be that otherwise it would be possible for the one government so to burden with its own duties the officials of the other government as seriously to interfere with the proper performance by those officials of the duties laid upon them by their own government.¹² But obviously there were other and deeper reasons than that of mere inexpediency which caused the Constitutional Convention to leave the Supreme Court apparently helpless as regards the coercion of the States.

¹¹ Mr. Barbour's argument in *Cohens vs. Va.*, 6 Wheat. 264.

¹² Story, *Commentaries*, III 538; Willoughby, *American Constitutional Government*, 123.

REASONS FOR ITS HELPLESSNESS

One of the chief reasons why the old Confederation failed was that the States were left by the Articles "to try, convict and punish themselves." When the Constitution was adopted, it was determined to place the government upon the *people*, instead of upon the States. But the States were not by any means eclipsed by the Union, and they still loomed large in the popular imagination. Patrick Henry, for example, opposed the adoption of the Constitution in the Virginia Convention because it created a government external to the government of his beloved Virginia, possessed of large powers over Virginia's citizens.

Why, it was argued, should we establish a new government, external to the States, when the States have but just achieved, by the Revolution, their independence from the external authority of the Mother Country?

The failure of the Confederation had clearly proved the futility of *appealing* to the States on behalf of the confederated government, to comply with the requisitions made by it upon them. Accordingly, when Governor Randolph submitted to the Constitutional Convention his plan for the new Union, it was found to include an express provision for the "calling forth of the force of the Union against any member of the Union failing to fulfil its duty under the Articles thereof."¹⁸ But when this article came under debate, Madison observed "that the more he reflected on the use of force, the more he doubted the practicability, the justice, and

¹⁸ Article VI.

the efficacy of it, when applied to people collectively, and not individually. A union of states containing such an ingredient seemed to provide for its own destruction. The use of force against a state would look more like a declaration of war than an infliction of punishment, and would probably be considered by the party attacked as a dissolution of all previous compacts by which it might be bound. He hoped that such a system would be framed as might render this resource unnecessary, and moved that the clause be postponed. This motion was agreed to, *nem. con.*"¹⁴ The result of this postponement and of the profound study to which this vital problem was subjected by the Fathers of the Constitution, was the rejection of Randolph's proposal, renewed in various forms, the refusal to give the federal government the right to exercise military power against a recalcitrant state, and the creation of a Judiciary which should rest, not upon military, but upon civil power alone.

Thus the Constitution refused to sanction a resort to Civil War even in the sacred name of Justice; and, instead of adopting either military or police power for the coercion of a State, left the compliance of the State with judicial process to the operation of other, more rational, more democratic, and more effective forces.

Patrick Henry considered the Constitution, even with the mailed fist omitted, so far as the States were concerned a dangerous novelty. He denounced the new government as being "neither a limited monarchy, like England, with a compact between king and people, and checks on the former to secure the liberty of the latter; nor a confed-

¹⁴ Elliot's *Debates*, V 140.

eration, like Holland, which is an association of independent States, each retaining its individual sovereignty; nor a democracy, in which the people securely retain all their rights; but an alarming transition from a confederation to a consolidated government." Henry soon recovered bravely from these fears, and became one of the Union's staunchest supporters. But his objections to the formation of the Union are very significant and instructive at this time when the world is struggling painfully through the mire of an excessive nationalism towards the goal of a rational international organization. That this goal can be reached and should be attempted only along the road of a wholly non-military judiciary, it is the thesis of this paper to establish by an appeal to the history of our own Supreme Court as the key-stone and palladium of our Union.

THE REAL MAJESTY AND GREAT SUCCESS OF THE SUPREME COURT

Having admitted the apparent helplessness of the Supreme Court, in so far as the possession and exercise of physical force against a recalcitrant State is concerned, and having pointed out the reasons why the Court was left thus helpless by the Constitution and its framers, it is next to be pointed out that, despite its apparent helplessness, the Court soon won real majesty and achieved an extraordinary success. Not even a short study of this great subject is possible in this place. But it may at least be mentioned that it soon came to be realized that not only the success, but the very existence of the Union itself depended upon the Supreme Court's interpretation

of the Constitution, the acts of Congress, and the treaties negotiated with other nations;¹⁵ that the supremacy of the Union over the States, the preservation of peaceful relations between and among the States, the protection of the constitutional rights of the citizens of the United States and of the citizens within the States, the adjudication of admiralty and maritime cases, and the settlement of cases to which the diplomatic representatives of other nations were parties—all came under the aegis of the Supreme Court and gave to that Court a peculiar and resplendent lustre. To the successful performance of its great constitutional function within the Union,¹⁶ there may be added here a bare reference to the judicial triumphs the Court achieved, even in its early years. These triumphs were achieved for the most part, too, in the face of a jealous partisanship displayed in dramatic and forceful fashion by an executive and legislative of a different political complexion. There were times, of course, when the Supreme Court ran counter, and was obliged to yield, to the prevailing sentiment of the people as expressed by the Executive, the Congress, or a State legislature, as in the cases of *Chisholm vs. Georgia*, the *Olmstead* case, *Martin vs. Hunter's lessee*,

¹⁵ Daniel Webster gave early expression to this belief in the following convincing words: "No conviction is deeper in my mind than that the maintenance of the judicial power is essential and indispensable to the very being of this government. The Constitution without it would be no constitution; the government, no government. I am deeply sensible too, and, as I think, every man must be whose eyes have been opened to what has passed around him for the last twenty years, that the judicial power is the protecting power of the whole government." (Works, Vol. III. p. 176.)

¹⁶ For an impressive statement of the difficulty of performing this function, see G. T. Curtis's *History of the Constitution*, II, 421, ff.

the Creek and Cherokee cases *vs.* Georgia, the Dred Scott decision, and the Congressional policy of Reconstruction. But these exceptions are relatively very few indeed, and merely go to prove that even our Supreme Court, being human, is not infallible, and that it is not so rigid as to be wholly incompatible with the progressive development of a living society. It is also significant of the usual popular attitude towards the Supreme Court and its scores of decisions in cases to which States were parties, that the Court has been supported by the people even against the Executive and the Legislative of both States and Union throughout most of our history; while, during the relatively short periods when this support was largely lacking, the people and the court were divorced by the prejudices and passions engendered by war or by stupendous social issues. Again it is significant that when the pendulum of popular approval has swung away from the Court, it has nearly always, sooner or later, returned to it.

Popular support has sometimes failed to sanction the acts of the Congress, as well as the processes of the Judiciary, as in the case of the Alien and Sedition Acts, the Excise Law of 1791, the Embargo Laws of 1808, the Tariff Act of 1832, the Fugitive Slave Act of 1850, the Legal Tender Act, and the Internal Revenue Act as applied to "moonshine" distilleries. This popular resistance to legislation is the more significant when it is remembered that nearly all of it operated upon individuals and not upon States. Indeed, if the history of legislation and the history of judicial decision could be weighed against each other, the balance would turn largely in

favor of the interpretation and against the making of law.

During the period of the old Confederation when the government rested solely upon the States, and possessed no adequate judiciary, the States could, and did, by merely passive resistance, or failure to take positive action, nullify the acts of Congress and even treaties negotiated with foreign nations, quite as they chose.¹⁷ Under the Constitution, when legislation and judicial decision have to do chiefly with individuals instead of with States, the truth of Hamilton's prophecy that there would seldom be resistance has been amply established. Under the Constitution, the Supreme Court has adjudicated more than seventy cases to which the States were parties, and this has been successfully accomplished in the entire absence of any physical force to which the Court could appeal. The United States itself has voluntarily come before the federal courts, including the United States Court of Claims, in many scores of cases and has complied, through congressional legislation or by act of the Executive, with these courts' decisions, even though there existed not one shred of physical force to enforce either summons or judgment.

CAUSES OF THE SUPREME COURT'S SUCCESS

In view of the universally acknowledged and truly marvellous success of the Supreme Court, it is obvious that

¹⁷ Hamilton, explaining the reasons for the failure of the Confederation, says: "A circumstance which crowns the defects of the Confederation remains yet to be mentioned, the want of a judiciary power. Laws are a dead letter without courts to expound and define their true meaning and operation." (*The Federalist*, No. 22.)

its lack of physical force causes it to be only *apparently* helpless, and that it must possess powers and resources of the first magnitude which cause it in reality to be most potent and, indeed, the most vital force, from the point of view of permanency and consistency, in our government. An exhaustive analysis or even statement of these powers and resources cannot be attempted in this place, and it must suffice to point out but a few of them.

The three primary forces that have been so successfully relied upon in the past to sanction both the summons and the judgment of the Court, in its relations to the States, are, first, the official oaths and good faith of the State officials themselves; second, the prestige of the Court, the character and reputation of the judges, and the reasonableness of their judgments; and third, popular support as based upon enlightened and organized public opinion.

In his debate with Calhoun over the question of States' Rights, Webster admitted that "the States, by refusing to appoint Senators and Electors, might bring this government to an end. But," he added, "the same may be said of the state governments themselves. Suppose the legislature of a State, having the power to appoint the governor and the judges, should omit that duty, would not the state governments remain unorganized? No doubt, all elective governments may be broken up by a general abandonment, on the part of those intrusted with political powers, of their appropriate duties. . . . In a certain very important sense, the federal Constitution relies, for the maintenance of the government which it establishes, upon the plighted faith not of the

States, as States, but upon the several oaths of their individual citizens. . . . The duty binds the conscience of the individual. . . . Let it then never be said, Sir, that it is a matter of discretion with the States whether they will continue the government, or break it up by refusing to appoint Senators and Electors. They have no discretion in the matter." This reasoning may be transferred from the State's election of Senators and Electors to the acceptance of summons and judgments from the Supreme Court; for State officials take individually an oath to support the federal Constitution, and the Supreme Court is the interpreter of the Constitution, appointed to this function by the Constitution itself. Thus, a covenant with God, personal honor, individual conscience, bind the State officials, and through them the State itself, to a compliance with the processes of the Supreme Court.

Next, the prestige of the Supreme Court as an institution of civilization, founded as it is upon reason, dedicated to peace and righteousness, buttressed by a written constitution, and tested in the storms of many a controversy, is a splendid asset of persuasive compulsion upon a reluctant litigant, especially if that litigant be a State which is itself founded, dedicated, buttressed and tested in similar fashion.

The prestige of the Supreme Court was provided for and safeguarded by the Constitutional Convention with the utmost care. It was, equally with the Executive and Legislative powers of the government, made a constituent part of the Constitution itself, while the inferior Federal Courts were left to be created by congressional

enactment. The power to be embodied in it, namely the judicial power, was created separate and independent and on the basis of equality with the Executive and Legislative. To protect this independence and equality and to defend the Court against encroachments upon its power on the part of the Executive and Legislative, while at the same time the talents of the judges should be utilized for giving perspicuity, conciseness, and prestige to national legislation, it was even urged by Madison, Wilson and others that the Court should share with the President the right of revising and vetoing the acts of the Congress. But this proposition was rejected both because the Court, as the expositor of the law and the guardian of the Constitution, would have opportunity of defending its own constitutional rights, and because the purity of the tribunal which was to pass upon the constitutionality of the laws should remain unsullied from any participation in the law-making power. For the same reasons, the Convention refused to burden the Court with the duty of expressing its opinion, when requested to do so by the Executive or the Congress, upon "important questions of law and upon solemn occasions."

The method of selecting the justices of the Court was the subject of prolonged debate, and the Convention rejected the various plans of having them chosen by popular election, by the House of Representatives, and by the Senate; for it was argued that almost as bad as being a judge in one's own case is the appointment of one's own judge. To stimulate the President's wisdom and impartiality in appointing them, confirmation by the Senate was added to appointment by the Executive. It was pro-

posed that a property qualification of \$50,000 should be placed upon the judges; but this was rejected in the name of democracy and of the guilelessness of the judges alike. When once appointed, their time of office was to be during good behavior, and not for a definite term of years, and this provision in the interest of independence was extended also to judges of the inferior Federal Courts, even though these courts were to be created by the Congress. As a further bulwark of their independence and impartiality, the Convention rejected the proposal to make them removable by the Executive on demand of the Congress. Instead of this process of virtual attainder, impeachment alone was permitted as the means of their removal from office. Their salaries were to be fixed, and not to be diminished during their term. At first it was decided that there should be no increase in their salaries during their term; and when this was stricken out, it was proposed that no increase should take place within three years of the enactment. But though the possibility of an unconditional increase was agreed upon, it was provided that no one should enjoy such increase who had participated in enacting it. Gouverneur Morris and a committee of the Convention urged that the Chief Justice should become *ex officio* a member of the President's Cabinet; but this was rejected, again in the interests of the independence and impartiality of the judiciary, and it was urged by the representatives of that State which is honorably renowned for so-called "Jersey Justice" that "none of the Judiciary shall, during the time they remain in office, be capable of receiving or holding any other office or appointment during their term of service, or for——(blank years) thereafter."

By such varied and eminently wise provisions, the Constitutional Convention sought to create and preserve untarnished the prestige of the Supreme Court, and it added greatly to this prestige by the large powers which it conferred upon it. Its jurisdiction was made for some time by the Convention to include "such other questions as may involve the national peace and harmony;" while Luther Martin of Maryland, the great protagonist of the rights of the States, moved that it be given expressly jurisdiction over claims to the Western lands which might be advanced by any of the States. Both of these powers were provided for in the Constitution, by giving the Supreme Court original jurisdiction over all cases in which a State or the United States is a party; and one of the chief glories of the Supreme Court is the marvellous success it has had in preserving "the national peace and harmony" by substituting in scores of cases judicial settlement for wager of battle between the States and the United States and among the States themselves. To add still further to the power and prestige of the Supreme Court, with the result of making it a still better exemplar of the International Court of the future, the Convention conferred upon it original jurisdiction "in all cases affecting ambassadors, other public ministers and consuls."

In other countries than ours (except in Australia and a few Latin-American Republics), the courts cannot question the supremacy of the legislative bodies; hence the compliance or non-compliance of legislation with written or unwritten constitutions is no concern of the courts. But not so with us. Our Supreme Court is the interpreter and guardian of the Constitution; therefore,

it has the prestige and majesty of the Constitution itself. In fact, the popular appreciation of this great function of the Court was one of the chief reasons for the early rise of a veneration for the Constitution itself. As the interpreter and guardian of the Constitution, it is the protector of the States against aggressions of the Federal Government; therefore it has the prestige which springs from affection for the States. As the interpreter and guardian of the Constitution, it is the protector of the Federal Government against the aggressions of the States; therefore it draws to itself the love which is lavished upon the Union. As the interpreter and guardian of the Constitution, it is the bulwark of popular liberties; therefore it is regarded as the very embodiment of the Spirit of Liberty. As the guardian and interpreter of the Constitution, it protects civil government against revolution and anarchy; therefore it wears upon its brow all the majesty of Law itself. As the guardian and interpreter of the Constitution, it protects the minority against "the impatient vehemence of a majority;" therefore it is regarded as the incarnation of Fair Play.

By means of its prestige and its judicial power, the Supreme Court fulfils in an admirable manner the maxim of Burke: "Whatever is supreme in a state ought to have, as much as possible, its judicial authority so constituted as not only not to depend upon it, but in some sort to balance it. It ought to give security to its justice against its power. It ought to make its judicature, as it were, something exterior to the state." Fulfilling this maxim, the Supreme Court has come to be regarded in the hearts of the people as being more under the control of the

moral law, or equity, and less subject to the discretion of individuals or the impulses of the masses, than are either the Executive or the Legislative; hence the common theory that a judicial summons or decision rests upon a higher sanction than does an executive order or statute law. Perhaps thus has modern democracy transferred to its judiciary the sanctity that once did hedge a king, and approximate human justice to the divine.

PUBLIC OPINION

The last and greatest sanction of our Supreme Court is the sovereign power of an enlightened and organized public opinion. The fundamental political axiom in our American system of government is that all political power originates with the people and is retained under popular control. By the adoption of State and Federal constitution, the people have delegated the temporary exercise of their sovereign power to their duly elected public servants; and the people take a direct part in the management of their government only in accordance with the rules and regulations which they themselves have prescribed. The *vox populi* is not legally expressed in Jacksonian "popular sovereignty," or in "revolution." But it is nevertheless the *vox Dei* in our government throughout all of its activities. "We the people" did not only "ordain and establish" the Constitution, but we have continuously supplied it with a potency which is alone sufficient. Finding a multiplicity of means of expression, the popular will has not only made, but has kept, this government a government of the people, by the people and for the people. Public opinion is its very

breath of life, and without this, even the Constitution would be but "a scrap of paper."

This is fundamentally true of the Judiciary and the Executive, as well as of the Legislative. "There is no legislative assembly in our time which does not sit with windows open listening to the voices from outside."¹⁸ There is no Executive army or navy, however mighty, which would be but as dust in the balance against the will of the people. Public opinion is in a peculiar sense the dynamic power of the Judiciary. This is especially true, of course, in our own democratic republic; and it supplies to our Supreme Court as real and effective a means of "enforcing" its processes as any that stands behind the Executive and legislative, a means which is, in fact, the *only* effective sanction behind any act of government.

The great potency of public opinion was recognized in the infancy of our government, long before the modern agencies for the enlightenment and organization of public opinion were developed. For example, it was mainly through the conversations and letters of Washington, Hamilton and others, that the people were led to demand "a more perfect Union;" and it was by means of the letters of Thomas Jefferson that the Democratic party, which was to control the government for a half-century, was built up. Varied attempts were made, also, to provide a special machinery for the expression and direct action of public opinion. For example, Pennsylvania's Constitution of 1776 provided for a Council of Censors

¹⁸ M. Beernaert, of Belgium, at the second Hague Conference.

to act as interpreter and guardian of the constitution; and for the successful performance of this high duty, the Council was given the power of passing public *censures*, as well as the power of ordering impeachment and of recommending the repeal of unconstitutional legislation. Through the operation of this Board and its censure of the action of militia officers in the Wyoming Valley, a crisis in the relations between Pennsylvania and Connecticut was safely passed. Vermont and New York adopted similar provisions in their constitutions of 1777; and the same engine of public opinion was advocated in the Constitutional Convention for the federal government.

But not even this additional safeguard was deemed necessary to assure the authority and power of the Supreme Court. Public opinion was left to find its own means of expression; and yet the Supreme Court rests under the serene consciousness that this expression in its favor, or in favor of its just and righteous processes, may be depended upon as surely as the sunrise. As regards the relations between the Court and a delinquent State government, the successful resistance of the State government would require a compact between the State's executive and judiciary, and the support of the people's representatives in the legislature as well as of the people themselves. If the people were sufficiently enlightened to distinguish between a constitutional exercise of judicial authority and an unconstitutional usurpation of it, a State's officers would ignore or defy the processes of the Supreme Court only in the clear case of a tyrannical

exercise of the federal judicial authority.¹⁹ At the same time that the public opinion in the State of the recalcitrant government was playing upon the officials, it would receive additional and overwhelming support from the public opinion within other States and within the nation as a whole. How powerful is this external public opinion, how much feared or respected it has been, is proved by the fact that whenever a State government has prepared to defy the federal government, it has moved heaven and earth to carry with it not only the popular approval of its own citizens but also the public opinion outside of its borders. For example, the Virginia and Kentucky Resolutions, the Hartford Convention, the South Carolina Conventions of 1832 and 1861, all made fervent appeals to the people of the other States. It is especially significant that these appeals were made by States which declared their free and independent sovereignty, in the same breath that they implored popular approval and support from the people of other States! When this appeal for popular support met with popular condemnation, the attempted resistance of the States to the Union collapsed, and this in face of the fact that Virginia went to the length of purchasing arms in 1798, and South Carolina actually enrolled troops in 1832.

It is true that in 1861, the Supreme Court's decision as to the right of secession would probably have proved powerless to prevent the Civil War, just as legal attempts on the part of the Executive failed to prevent it. The

¹⁹ Cf. Hamilton's argument in the *Federalist*, No. 22, against the exercise of a State's right of secession or nullification. Public opinion can make itself directly effective in such cases by the process of impeachment.

appeal was made by the South to trial by battle. But even the South itself acknowledged within a few years that it had acted in opposition to, or rather in the absence of, an enlightened self interest and under the influence of a self interest which, so far from being enlightened, was blinded by the passions and prejudices connected with human slavery. Moreover, it seems altogether probable that had there been in the South a well organized public opinion, though based solely upon an enlightened self-interest, the State officials would not have succeeded in their attempt to break up the Union. Hence, the logical conclusion is that, just as the best cure of the ills of democracy is *more* real democracy, so the strengthening of the government in general and the processes of the Supreme Court, based as they are, in so far as regards the States, upon public opinion, is to be procured by *more* public opinion, enlightened, organized, expressed and applied.

So deep-seated in the popular mind is the veneration and affection for the federal judiciary, that the people have decided on more than one occasion to protect it even from themselves. For example, the recent proposals for the "recall," first of judges, and then of judicial decisions, met with a genuine tempest of popular protest and denunciation. From the President down to the country editor, all classes of the people gave voice to their dissent. The general feeling of opposition, and the popular regard for the courts, upon which the opposition was chiefly based, was well expressed by Dr. Andrew D. White, who called the proposal "the most monstrous proposal ever presented to the American people or any

other people," and said: "The one thing which the various peoples of the world envy us above all other institutions is the possession of the Supreme Court. The most eminent authorities in all parts of the world speak of it with reverence as the greatest court ever created and the only one of its kind that has ever existed."

Madison, with characteristic cogency, sums up the subordination of both State and federal governments to the will of the people, in the following words:²⁰ "The federal and State governments are in fact but different agents and trustees of the people, constituted with different powers, and designed for different purposes. The adversaries of the Constitution seem to have lost sight of the people altogether in their reasonings on this subject; and to have viewed these different establishments not only as mutual rivals and enemies, but as uncontrolled by any common superior in their efforts to usurp the authorities of each other. These gentlemen must here be reminded of their error. They must be told that the ultimate authority, wherever the derivative may be found, resides in the people alone, and that it will not depend merely on the comparative ambition or address of the different governments, whether either, or which of them, will be able to enlarge its sphere of jurisdiction at the expense of the other."

THE SUPREME COURT AS THE EXEMPLAR OF THE WORLD COURT

It is America's chief glory in these days of international organization to be able to give the world as an exemplar

²⁰ *The Federalist*, No. 46.

of the World Court its own great tribunal, the Supreme Court of the United States.

This court was "wrung from the grinding necessities of a reluctant people;" it was the chief instrument by means of which the overweening local "nationalism" of the thirteen States was transformed into the beneficent "internationalism" of the Union. From their Declaration of Independence, in 1776, and throughout the period of the Confederation, from 1781 to 1789, the State legislatures had dominated the executives and the courts of both the States and the Confederation. Under the Constitution, from 1789 onward, the Supreme Court checked the "nationalism" of the States and became the chief ally of Washington, Hamilton and their compeers in teaching their fellow-Americans to "think Continentally." In our time the Hague tribunals have already begun to check the exaggerated nationalism of the nations; and the World Court is destined to become the chief agency in teaching the people of the world to "think internationally."

At the same time that the Supreme Court has developed State "nationalism" into "continentalism," it has carefully refrained from infringing upon the intrinsic rights of the State; for example, it has itself declared that in every respect except where the acts of Congress have made special provision, the courts of the States and of the United States are as distinct and independent in the exercise of their powers as are the courts of separate and independent nations.²¹ Hence, if this precedent of

²¹ *Rogers vs. Cincinnati*, 5 McLean, 337; *Riggs vs. Johnson County*, 6 Wall. 166.

the Supreme Court be followed by the World Court, there will be no danger lest rightful nationalism be swallowed up in an overweening internationalism.

The Supreme Court itself decides whether or not a given case comes within its jurisdiction. This successful precedent may serve as the key to the difficulty, which exists at present, of determining whether or not treaties of obligatory arbitration containing the loopholes of national honor, vital interests, and the like, can be made to bring international disputes before the international court, instead of to the arbitrament of the sword.

The Supreme Court is both limited by, and the guardian of, the written Constitution of the United States. This is regarded by all political scientists as the peculiar distinction of our form of government, and we Americans look upon it as not only the New World's specific contribution to the science and art of government, but as also a preëminently successful one. The World Court, constituted by a written convention agreed upon at The Hague, may well take over this function, in so far at least as the definition and operation of the Court's own jurisdiction is concerned.

The Supreme Court, with only nine justices upon its bench, has jurisdiction over the United States and over forty-eight commonwealths many of which are larger than several members of the Family of Nations. Within these forty-eight commonwealths live loyal descendants of every kindred, tongue and nation. The great mass of inhabitants within these forty-eight States give no thought to the question of which States are directly represented on the bench of the Supreme Court, and ninety-nine

out of every hundred Americans do not know the name or birth-place of the Chief Justice himself; and yet there is unquestioning confidence that every State and every citizen has adequate *judicial* representation. This lesson, that *judicial* representation does not mean *equal* or *proportionate* representation, as is the case with legislative representation, is one that our Supreme Court contributes to the solution of that question which has hitherto proved the insurmountable difficulty of the World Court, namely, how can a court of fifteen judges adequately represent the forty-six members of the Family of Nations?

The Supreme Court has original jurisdiction over cases to which diplomatic agents and consuls are parties, as well as over admiralty and maritime cases, and hence has played an honorable rôle in international affairs. The World Court, by accepting at least appellate jurisdiction over similar cases as well as original jurisdiction over cases to which the states are parties, might well fulfil the functions of an international court of prize and even be in a position to "recognize," in the name of the entire Family of Nations, each new state as it appears above the international horizon.²²

A problem of paramount importance on the threshold of our Union was the disposition of the claims of the States to great tracts of wild lands West of the Allegheny Mountains. So fearful were the small States lest those with vast claims in the West might eclipse and overwhelm them, that the chief champion of the small States in the

²² What a boon this would be to the governments individually is well illustrated by our own difficulties with Huerta of Mexico.

Constitutional Convention, Mr. Luther Martin of Maryland, proposed the specific gift to the Supreme Court of jurisdiction over those claims. Although this proposal was not adopted directly, the Supreme Court was given such jurisdiction indirectly by being vested with original jurisdiction over all cases to which a State, or the United States, is a party. It is even possible that, following this most important and most successful precedent, the World Court might solve the fundamental problems of "Spheres of Influence," "The Open Door," and various others that arise successively from modern imperialism and colonization. Thus the question of "expansion," which threatened to prevent or disrupt our infant Union, but which, under the benign jurisdiction of the Supreme Court, became one of the strongest supports of the Union, might be similarly and beneficently transformed for the nations under the aegis of the World Court.

The apparent helplessness of the Supreme Court, in its summons to the States and in the enforcement of its judgments against them, would be paralleled in the World Court. The lack of a police power or military force, for the coercion of a sovereign state, would be the most astounding defect of both, in the minds of the thoughtless or of those obsessed with the war-born assumption that there is no real power among men except that of national armaments or an alliance of national armaments.

But the vast and genuine power of the Supreme Court, and its extraordinary success, would reassure the builders of the World Court as to its stability and power. For the same forces of civilization would be the foundations of both. The oaths of the State, or national, offi-

cial to sustain the Constitution under which each court is created; this covenant with God and their own consciences, and the good faith and honor arising from it; the majesty of the Supreme Court and the even more majestic World Court; the character and reputation of, the judges, and the irresistible appeal of the reasonableness upon which their judgments are based; above all the enlightened and organized public opinion, within each State and within the Union, in the case of the Supreme Court, and within each nation and within the entire Family of Nations, in the case of the World Court: such are the invincible forces of civilized society which have brought marvellous success to an apparently helpless Supreme Court in dealing with forty-eight commonwealths, and which could be confidently relied upon to give an even more illustrious career to the World Court in dealing with forty-six nations.

It is true that on one memorable occasion in our history, in 1861, our Supreme Court would probably have failed, had it been called upon to act, in "maintaining peace and harmony among the States." But it would have failed for the same reason that the executive and legislative, with their police power and military force, did fail, namely, because the seceding South lacked the last great sanction of the Court, the sanction of an enlightened self-interest and an organized public opinion. The South itself soon acknowledged that the presumed self-interest upon which it seceded had been blinded by the passions and prejudices associated with human slavery; and there were many evidences during the war that a large body of public opinion in the South which favored the Union was wholly unorganized.

It is true that on the memorable occasion of July, 1914, a World Court would possibly have failed to prevent the Great War, just as the European executives and legislatures with their unprecedented national armaments and alliances of national armaments failed egregiously to prevent it, or as yet to end it. But it would have failed for the lack of a national and international public opinion, largely unenlightened and wholly unappreciative as to the possibilities of judicial settlement, and blinded by the passions and prejudices associated with supposedly invincible armies or irresistible navies.

Against these two possible failures of the two great Courts, may be placed the successful adjudication by the Supreme Court of more than seventy disputes to which the States have been parties, the fifteen disputes among the nations adjudicated by the Permanent Court of Arbitration since 1903, and the settlement of more than 240 international disputes by temporary arbitral tribunals since 1795.

In view of these, among many other substantial considerations, is it to be wondered at that we Americans should confidently offer our Supreme Court as the great exemplar of the World Court that is to be? The crowning service of our American delegation at the second Conference at The Hague was the creation of the Court of Arbitral Justice, which was unanimously agreed upon by the nations in every detail, with the exception of the method of appointing the judges. Shall it not be our next great American service, as a thank-offering for our escape from the terrible catastrophe of the Great War, to develop this Court of Arbitral Justice along the lines of our Su-

preme Court into a genuine Court for all the World? What finer, greater gift could our New World make to the Old, in recognition of our physical, mental and moral inheritance from the Old World, war-crushed as it is in our time, than a Supreme Court of the Nations which should teach the Old World and the New alike to learn war no more?

THE PRESIDING OFFICER: Gentlemen, this was the last speaker of the morning. There is one matter however that has been left unattended to, and that is the report of the Committee on Nominations.

MR. WHEELER: Mr. Chairman, the Committee has agreed on the nominations, with one or two exceptions. We recommend for the presidency the Hon. Elihu Root. We retain almost all of the advisory counsel. There are two positions for the vice-presidency and the secretaryship, which are under advisement. We have not heard from Mr. Knox, and we are going to ask therefore that the final submission of the report be postponed until this evening. I am very sorry that I shall not be able to be present, but I will ask my associates on the Committee, in conjunction with Mr. Marburg, to present the report.

THE PRESIDING OFFICER: If there be no objection, the report will be presented this evening at the dinner, which takes place here in the Shoreham, as I understand, at seven o'clock.

If there be no further business, we will stand adjourned, but before doing so, let me thank, in the name and on

behalf of the Society, all of the speakers who have been good enough to come, many of them from distant parts of the country, one from a foreign Dominion, to take part in these proceedings, and to give us the benefit of their industry, of their judgment, and I may also add, of their wisdom.

MR. WHEELER: I am reminded by one of my co-committee-men, of what is perhaps an oversight, although I feel sure it would be understood. As I said, it is not the desire to make any substantial changes in the offices of the Society, and amongst others, it is with great pleasure that we shall recommend for reëlection as honorary president, Mr. Taft.

THE PRESIDING OFFICER: There being no further business before the meeting, it is adjourned

(Thereupon, at 1.10 o'clock p.m., the Conference adjourned.)

BANQUET OF THE AMERICAN SOCIETY FOR
JUDICIAL SETTLEMENT OF INTER-
NATIONAL DISPUTES

Shoreham Hotel

SATURDAY, DECEMBER 9, 1916, 7 O'CLOCK P. M.

MR. MARBURG: Ladies and gentlemen, before presenting the inimitable toastmaster of the evening, there is a little transaction of business that must be interjected, the nomination for officers of this Society for the ensuing year. Is the Committee ready to report?

REPORT OF COMMITTEE ON NOMINATIONS

MR. SNOW: In the absence of Mr. Wheeler, who was appointed Chairman of the Committee on Nominations, who is unable to attend the banquet on account of necessary absence in another city, I have been requested to act as chairman by him and by Mr. Ralston, the other member of the Committee.

The Committee appointed to nominate officers of the Society for the year 1916-1917 have the honor to report the following nominations:

For Honorary President, William H. Taft.

For President, Elihu Root.¹

¹Owing to Mr. Root's inability to serve, Hon. Andrew J. Montague, of Virginia, at a special meeting of the Committee, was elected President for 1917 and kindly accepted the office.

For Vice-President, Philander C. Knox.

For Secretary, James Brown Scott.

For Treasurer, J. G. Schmidlapp.

For members of the Executive Committee: Andrew J. Montague, Philander C. Knox, J. G. Schmidlapp, W. W. Willoughby, Henry B. F. Macfarland, James Brown Scott, ex-President, John Hays Hammond, ex-President, Simeon E. Baldwin, ex-President, Joseph H. Choate, ex-President, Theodore Marburg, ex-President.

MR. MARBURG: Are there any other nominations? If not, the steam roller will proceed on its course. What is your pleasure in regard to these nominations?

MR. MACFARLAND: I move that the Secretary be authorized to cast the vote of the Association for the officers nominated.

MR. MARBURG: Without objection it is so ordered.

SECRETARY SCOTT: The Secretary reports that he has cast the vote of the Society for the officers nominated, and they are all unanimously elected.

MR. MARBURG: It is a great triumph for these gentlemen in the face of this strenuous opposition.

We will now proceed with the real feast of the evening. It is my pleasure to present to you as toastmaster Mr. Macfarland.

ADDRESS OF MR. HENRY B. F. MACFARLAND

Mr. President, we have found out what to do with our ex-Presidents—put them all on the Executive Committee. That is one of the good things about this report which we have just adopted. I think the best thing about it is that the President of the Society is the former Secretary of State who gave the instructions to the American delegation to the Second Hague Conference in 1907, which Mr. Choate and Dr. Scott, and the other delegates, carried out in securing the adoption in principle, and indeed in outline of the Supreme Court of the world, the International Court of Arbitral Justice, which it is the particular object of this Society to establish. And the Vice-President who under the practice of the Society will succeed next year, I presume, to the presidency, is that other former Secretary of State, now happily returned to the Senate from Pennsylvania, who did all that he could do to bring about the settlement of the representation, and the selection of the judges, of that Court, which would have started it upon its career, when circumstances delayed it, and the war came on and it was obliged to wait. It seems to me that we are peculiarly fortunate in having as President and Vice-President, Mr. Root and Mr. Knox, as we are peculiarly fortunate in having as perpetual Secretary, Dr. Scott.

Now, the moment for which the orators have been impatiently awaiting has arrived. I hope the listeners, if there are any present—for I think the Society is chiefly made up of orators judging from an examination of these programs, past, present and to come . . . if there are any listeners here besides the ladies, who perform that

office with such grace and such patience (Mr. Evarts said that the Pilgrim Mothers had not only to stand all the rigors of the New England climate, and all the hardships, but the Pilgrim Fathers as well) if there are any listeners here I want, as counsel for the orators, to bespeak their patience and courteous attention.

I was told that there was a minority of one in the Society tonight which wished to abolish the after dinner speaking which the Society has now survived for six years; it wished a new order of things, even to the extent of proposing that next year, if there was any oratory at all, the tables should be turned and the ladies, who have so patiently furnished the listening for all of us, should be the orators of the occasion. But on the whole, he said, he thought the time had come to abolish oratory altogether. I was reminded of the story of the two darky women, here in town, overheard in a street car—this actually happened.

One of them said, "I hear you has left your husband."

"Yes."

"Why did you leave him? Did he beat you?"

"No, I just nachelly lost my taste for him."

Evidently this minority of one has just lost his taste for the interesting after dinner speaking which we have always had, which we are going to have tonight, and which I for one hope we shall have next year. I am very sure we shall have it if we have the ladies present and speaking.

This is a very courageous Society. Some of my friends who have thought, as your friends have thought if they knew of your membership in the Society, that it was a

Utopian thing and that we were wasting our time, are now firmly persuaded of it. The war has so affected the minds even of intelligent men and intelligent women that, for the time being, it seems as though the minds of some were clouded literally. There is a sort of intellectual or moral suicide in the despair of some of our friends. They cannot understand why we do not disband, why we have any idea that we shall ever be able to attain the object of a supreme court of the world, that we shall ever be able to bring about the settlement of justiciable cases by a court instead of having all disputes settled by the sword. I think the Society by its very meeting, by its being here, without abating in the least its determination or its hope and expectation, has done a great service, witnessing to these despairing people that there is still hope in the world and in this very particular enterprise which is dear to us. We know very well that this great storm, great and terrible as it is, with apparently at the moment no compensation except the silvery lining in some of the clouds of unexampled heroism and self sacrifice both of men and of women, not only of the belligerents but even of some Americans—that this cloud, that this storm will pass—"This, too, shall pass away"—as the signet ring of the Persian king said, and we shall live to see a time of peace, a time in which justice shall once more be established, and in which the world court shall come into being.

I was reading last night, by way of preparation for tonight, the very interesting proceedings in 1910 of this Conference. Mr. Carnegie was present and spoke. He had just given the \$10,000,000 for the Carnegie Endow-

ment for Peace. The Minister of Holland spoke of the approaching completion of the Palace of Peace at the Hague. Some of the speakers thought that the court might be set up by the time of the next meeting of the Hague Conference, which was set by the resolution of the Conference for 1915. All was bright with promise and full of hope. It did not seem to take courage then to proclaim that belief.

But tonight it does take courage, not here; but when we get out of this room, into the cold world, and into the presence of our despairing friends; and it seems to me that the Society is doing, in this meeting, the greatest service it has ever done in asserting its faith in the hour of blackness, as it seems to so many of our friends.

Brutus and Cato may dismiss their souls
And give them furlough to the other shore;
But we like sentries still must stand
In darkest night and wait the appointed hour.

Which is sure to come.

The first speaker tonight as the historian of the Supreme Court of the United States, was most fortunately selected by the Committee, because the general theme, as perhaps you all know, even if you have not been present at the meetings of this Conference, is the Supreme Court of the United States, as furnishing the analogy, the example, if you please, for this proposed Court of the World. From the 1910 Conference we have spoken of that at every meeting; it is a subject of many phases, a wealth of interest, and I am very sure that we shall be very glad to hear Mr. Hampton L. Carson, who is the first speaker tonight.

REMARKS OF HON. HAMPTON L. CARSON

Mr. Toastmaster, and ladies and gentlemen; the warning which the Toastmaster has given a modest and unobtrusive stranger, not a member of your Society, that every member of the Society save one was viewing him at the present moment with a hostile eye, because depriving each of you of an opportunity to make a speech makes it a little more a matter of wonder on my part that you should have sent all the way to Philadelphia and asked a Philadelphia lawyer to talk to you on this occasion. There was a time when Philadelphia lawyers were not so highly thought of. I recall having picked up a brochure on a bookstall in old London some fifteen or sixteen years ago, which was published there in the year 1690, about eight years after William Penn had landed on the shores of the Delaware, which gave an account of the flourishing province of Pennsylvania, at that time consisting almost entirely of the city of Philadelphia, containing *two thousand* people; and after speaking of butchers and bakers and brewers, bricklayers and masons and jewelers, the author said, "Of doctors and of lawyers I shall say nothing because the place is very peaceable and healthy," and then he added this pious prayer, "Long may we be preserved from the pestiferous drugs of the one and the abominable loquacity of the other." Now, I do not want, Mr. Toastmaster, to revenge myself on this audience for such a discriminating remark. I do recall that about three years ago, when the hangman's rope in Pennsylvania was abolished and the electric chair was substituted, an old lady, reading the morning paper,

said, "I see they have a new form of death—death from elocution."

The Toastmaster has said that the subject of the Supreme Court of the United States was largely the topic of your discussions. Your President suggested that perhaps I might say a few words on the sources of the jurisdiction of that Court. Without going into too great detail, or into a technical discussion, it may be interesting to trace the origin of the grandest conception of the Constitution of the United States, in the establishment of an absolutely independent tribunal, armed with authority to settle differences between contending sovereignties without the spilling of a drop of blood. That thought glorifies the Court. If the thought applied to thirteen original sovereign states, and subsequently extended to an imperial republic of forty-eight sovereign estates, can be taught as a lesson to the nations of the world proving that such a tribunal occupies a position not only of influence and authority, but also is a model instrument for the peaceful adjustment of the affairs of men, then we are simply extending to the future the thought which had its origin in events of the seventeenth century.

No man can philosophically assert that the Fathers of 1787, at the time they assembled in the twice sacred hall which stands on the holiest spot on American ground—the old Independence Hall in Philadelphia, where the Declaration of Independence was signed, and the Constitution was framed—were creators in the sense in which Mr. Gladstone used the words that "the Constitution of the United States was the most remarkable instrument that had ever been struck off at any given time from the brain and purpose of man."

The Constitution was not a creation; it was an evolution. It grew out of the past, just as existing institutions have their roots in the past, and just as the future must grow out of the present. There is no wisdom so profound, no foresight so far-reaching, no intellect tall enough, to see the tops of distant thoughts when toiling over plains a century or more away. Wise though the Fathers were, and equipped with extraordinary experience, they did nothing more than skillfully expand, modify and re-apply to new conditions principles which had been working under the Providence of God through the past ages.

Without going too far back, let me remind you that when the war between France and England was at an end, which terminated in the peace of Ryswick, in 1679, the New England colonists in particular had taken advantage of the non-intercourse between the mother country and themselves to carry on direct trade with Ireland and with Scotland. The English merchants bitterly complained that New York, Massachusetts, Pennsylvania and the Carolinas would not observe the laws of trade; that Pennsylvania and particularly the shores of Delaware, and the Carolinas, were nests of pirates and sea thieves. The Crown therefore established what was called the Board of Trade, or the Lords of Trade, and as the result of Parliamentary action, certain vice-admiralty courts were established in every one of the colonies, subject to an appeal to a special committee of the Privy Council charged with the consideration of trade affairs.

After a while those vice-admiralty colonial courts were modified, so far as the basis of their establishment was

concerned, very much to the dissatisfaction of the colonists themselves. Massachusetts contended that she ought to have been consulted as to the exact form in which the vice-admiralty was established. The Crown pointed to an express reservation in the Massachusetts charter which justified the creation of the court. In my own State of Pennsylvania, William Penn, under his charter, had been equipped with complete jurisdiction to establish courts and appoint judges, and it seemed to be in derogation of his proprietary rights to establish a court where he neither appointed the judge nor had any authority in defining the jurisdiction.

But at all events the matter became a subject of constant debate, running, as trade matters do, from year to year without any satisfactory settlement; appeals lay from vice-admiralty courts to the King and Council, and in that way (I want you to observe this, because it involves a general principle) the thought of appealing a case, originating in an admiralty cause, to some higher power, became gradually introduced and familiarized.

When the trouble came on between the Crown and the colonies as the result of the Stamp Act and other similar pieces of Parliamentary legislation, and the first Continental Congress met in September of 1774, in Carpenters' Hall in Philadelphia, John Jay of New York, in drafting an address to the people of Great Britain, to the people of Canada, to the people of America and in the protest to the Crown, laid great stress upon the dissatisfaction which existed over the manner in which the jurisdiction was exercised by the admiralty—particularly because it dispensed, so far as determining questions of fact, with

jury trials, and again because the judges appointed by the Crown, holding their offices not by the tenure of good behavior as in the case of Common Law judges but at the will of the Crown, remunerated themselves, so far as their salaries or perquisites were concerned, out of every condemnation and prize.

Then the affairs at Lexington Green, at Concord Bridge and at Bunker Hill occurred, and war took place between the mother country and the Colonies. The moment that the Declaration of Independence severed the tie that bound the Colonies and the Throne, the Continental Congress attempted to adjust itself to conditions of war. At any rate, affairs were in entire confusion. When General Washington was besieging Boston in the winter of 1775, the cruisers plying those eastern waters were of two sorts, those fitted out by the States, and those fitted out by the Continental Congress. Joint captures would sometimes be made, and difficult questions of prize and the distribution of prize money would arise. They were referred to General Washington.

George Washington, though not a lawyer, has the honor of being the first man to use the word "court" with regard to a judicial establishment intended to adjust, rectify and control a condition of affairs such as I have described. He was appealed to as the Commander-in-Chief to settle disputes, where a New Hampshire privateer, a Massachusetts privateer and a Connecticut privateer would each claim that their right to prize ought to be recognized, and that the others were intruders upon the capture. Washington protested that he was a mere soldier, that he could not sit as an admiralty

judge; that he had not knowledge of admiralty law or the principles of navigation or naval warfare, and, besides that, he bitterly complained that he had not the time. He wrote a letter to the Continental Congress and said, "Do you not think that under these circumstances *a court* should be established in order to take charge of these matters with which I am very much annoyed, and for the settlement of which I am absolutely incompetent?" I am not using his exact words, but that is the substance of them.

Finding no attention paid to it—his first letter I think was written in September—he followed it up by a second letter in December, calling attention to his former letter, and then still despairing of having action taken, he wrote a letter to Richard Henry Lee, of Virginia, calling on him to use his influence to the utmost—Lee being the man, you recollect, who afterwards introduced the resolution of the 8th of June which was the precursor of the Declaration of Independence:

"Will you not see that a court is established for the purpose of taking charge of these matters of perplexity?"

Now, although Washington was in the dark with regard to the action of Congress, Congress had not been inattentive to his request. In fact, it acted with a good deal of promptitude. His first letter was written in September, and on the 25th of that month a motion was introduced at the instance of Benjamin Franklin, by which, not a court, but a Committee on Naval Affairs was appointed. The Congress shrank from the thought of making a judicial establishment—most of the lawyers in the body questioned their power, questioned their

jurisdiction, did not think they had authority to create a Court. Recollect, there were no Articles of Confederation in those days. They were of the opinion that they had no authority to take such a radical step, but they subsequently passed an act recommending to each one of the thirteen states the establishment of a state court for admiralty matters.

Pennsylvania being right alongside of the Continental Congress, meeting in Philadelphia, was naturally the first to act because she first got the expression of Congressional sentiment. Every other state followed and they established state admiralty courts. The difficulty was that there was no harmony or unanimity of sentiment among them as to how questions of fact should be determined. In some of the states they said, "Let it be by jury trial;" in Pennsylvania, in Massachusetts and in Virginia they made it obligatory; in Maryland it was purely optional; in some of the states, as in Georgia, it was referred to some sort of a special tribunal. But at all events the effort was then made to settle by a distinct authorization, more or less rude and inadequately equipped for an effective disposition of its business, but with the idea of settling differences between the contending sovereignties, which otherwise would plunge their hands into blood.

I am about to give you an excellent illustration of what occurred because it will stand as a sample of all others. But before I narrate the facts, I want to indicate that, besides these questions of conflicting prize, there were matters that disturbed the peace and quiet of the Continental Congress, and which taken together formed

the distinct sources from which a Federal jurisdiction inevitably sprung. I refer to contentions between the different colonies as to their boundary lines. The State of Pennsylvania had a contention with the State of Maryland as to her southern line, because what is now known as Mason's and Dixon's line at that time had not been established. The State of Virginia had a controversy with the State of Pennsylvania as to the extent of the Panhandle, so that had Virginia prevailed, Pittsburgh would have been a Virginia city. The State of New York had a controversy with Pennsylvania as to what is called "the smokestack," which gives us an outlet on Lake Erie, and had New York prevailed the city of Erie would have belonged to New York instead of to Pennsylvania. The States of Massachusetts and Vermont had a controversy. Vermont had a controversy with New Hampshire. Vermont also had a controversy with New York. South Carolina and Georgia were at odds over their boundary line and there was no settled jurisdiction anywhere to determine how an effective settlement should be made.

In addition to that there were piracies and felonies on the high seas. In addition to that, there were claims presented by citizens contending with each other under grants from separate states, from two or three different states, the grants overlapping each other like snow drifts, and all leading, as I will indicate to you in a moment, to serious and troubled affairs, not mere noisy debates not mere bloodless attempts to settle differences, but contests which amounted to internecine strife.

Taking two cases as an illustration of what I have said, I think that the first embodies the most splendid demon-

stration of the evolution of National authority that we have in our books. It happened in this way. In the fall of 1778, a young fisherman named Olmsted, of Connecticut, about twenty-two years of age, with two lads, his friends, younger than himself, was driven by a storm off the southern coast of Long Island far out to sea. When off the Capes of the Chesapeake they were captured by a British sloop known as the *Active* and taken as prisoners into Jamaica and landed at Kingston. The sloop *Active* there loaded with arms intended for the British army in the occupation of the city of New York. On the northern trip Olmsted and his two friends were forced against their will to assist in the navigation of the sloop, which carried a captain, some ten sailors and two passengers. As they approached the Capes of the Chesapeake, very nearly in the latitude of their place of capture, on a perfectly still, quiet summer night, when the captain and most of his crew were below, and there was but a single man at the wheel and one on the lookout, Olmsted roused his friends and determined to overpower the crew and capture the sloop. He succeeded in battening down the hatches and made prisoners of the captain and the majority of the crew. He put a pistol at the head of the man at the wheel, and he stationed his two boys to attend to the man on the lookout.

The consequence was that he was in possession of the sloop, and he steered for Little Egg Harbor on the New Jersey Coast. The captain waking in the morning, and finding that he could not get out on deck, stormed furiously about it, and then finding that he could not force the hatch, went to work with the ship's carpenter and

wedged the rudder in such a way that Olmsted could not steer, and wedged it in a manner to drive the sloop out to sea, in the hope that she would fall in with some of the English fleet cruising on the outside, and thereby take away the prize from that gallant Connecticut boy.

Olmsted then determined to subdue the crew by threats and by starvation. He said, "Unless that rudder is released, I will forbid you to get any water from the deck, and I won't throw anything except salt junk down there on which you can feed." That condition of affairs lasted for two or three days, the length of the voyage being materially extended because of very calm weather. In the meantime the suffering below was intense. The captain molded leaden spoons and other material from the table, into bullets, forced up the hatch and a battle took place, Olmsted being severely wounded in the thigh and one of his companions being shot through the lungs. But Olmsted was so powerful that he rolled a water butt over the hatch, and again secured his prize.

He was just making Little Egg Harbor—think of it, two men overpowering thirteen, after a four days' battle—he was just making the prize good by taking it into friendly waters when a French privateer, the *Gerard*, in company with a brig the *Houston* fitted out by the State of Pennsylvania, hove in sight, and captured him against his protest. Olmsted was hot about it and said, "This is robbery; the ship belongs to me, with the cargo." "Oh, no," the privateer said, "you cannot say that; you have not carried her into any harbor. Besides, it is a ridiculous thing to say that three of you, badly wounded, could hold the boat against the crew below. Besides

that, you may fall into the hands of the British fleet any moment."

Against his protest, they took the sloop; they circled the Capes of the Delaware, came up Delaware Bay, landed at Philadelphia, and there the matter was brought before the Pennsylvania state admiralty court, presided over by George Ross, as admiralty judge, George Ross being one of the signers of the Declaration of Independence. Under the Pennsylvania statute the verdict of the jury was conclusive on the facts, although under the act which established the court an appeal lay to what was called the "Committee of Appeals in cases of capture," of the Continental Congress.

William Lewis, the leader of the Philadelphia Bar at that time, represented Olmsted, and libelled the sloop. The French privateer was represented by Mr. Jared Ingersoll. The Pennsylvania brig also put in a claim. So there was a triple contest for the prize.

I have had the privilege of turning over the original papers, the depositions and everything of that kind, in the office of the Clerk of the Supreme Court of the United States where they are now reposing; so what I am stating is simply a summary of the testimony on the hearing that took place before Judge Ross.

Notwithstanding the overwhelming evidence in support of the heroic acts of the Connecticut fisherman lad, the prejudice of a Pennsylvania jury was so strong that it divided the prize into three parts, one-third to the Connecticut captors, one-third to the Pennsylvania brig and one-third to the French privateer.

An appeal was taken to the Committee of Appeals

of the Continental Congress, and the Committee promptly reversed the judgment. They heard the evidence, and they thought it was spoliation of a gallant man. The judge in the court below, however, pointed to the Act of Assembly, and said, "The verdict of the jury is conclusive on you; they found the facts in favor of those whom you are now treating as defendants, and you cannot disturb that verdict."

The report that was written by William Ellery, of Rhode Island, in vindication of the Continental authority, is one of the finest pieces of convincing reasoning. It is to be considered as an original paper, because in those days it was not usual to talk about Federal jurisdiction. Such a thing did not exist. He pointed out that it would be absolutely impossible to secure any steady, uniform rule, and an intelligent administration of the law, if the facts were to be left to the random guesses of successive juries, actuated by prejudice in one case, or by inability to see the justice of a cause in the other.

On the appeal which Olmsted took, he had to enter security. He was a Connecticut man. The surety on his bond was Benedict Arnold, himself a Connecticut man, then commandant of the military forces in the city of Philadelphia, and he had just married the famous belle, Peggy Shippen. It was his secret interest in support of his obligation as a surety in this case which was made the subject of one of the charges preferred against him by the Continental Congress when he was subsequently court-martialed, and was in part the cause of the black treason of which he was afterwards guilty at West Point.

The Continental Congress found itself, however, absolutely unable, after it had reversed the finding of the lower court, to enforce its decree. It issued a sort of admonitory paper, in the nature of an injunction, but with no authoritative power behind it to make it good, as the effective order of a chancellor, and an empty protest was all that it amounted to.

Now years rolled by. This contest began in 1778, and ran into 1783. In the meantime a case arose in New England in which the same question of power was attempted to be raised. It all hung in the air. There was no authority anywhere on the part of any government to step in between contending sovereignties and say, "There is the line of conduct to which you must square your action, or if you fail we will enforce it by a decree;" for an enforceable decree means nerve and life and strength in the realization that justice is a living thing and not a mere abstraction of the mind.

There was the weakness of the old Confederation. These cases slept until in 1787 the men who had signed the Declaration of Independence, eight of them in number, together with other colleagues, some of whom had been governors of states, some of whom had been judges, some of whom had been Members of Congress, met and framed the Constitution of the United States; and they defined in Article 3 of the Constitution, three brief but clear and pregnant sections, creating and defining the judicial power of the United States, and establishing the Supreme Court.

Among the earliest of the decisions of the Supreme Court of the United States was the New Hampshire

case of *Penhallow vs. Doane* (1 Dallas Rep.) in which the Court held that the old jurisdiction in admiralty, which had been exercised by the Continental Congress through its Committee of Appeals in cases of capture, was now vested in the district courts of the United States. Instantly the old Olmsted controversy broke out afresh. William Lewis, now an aged man, went into court and applied for a mandamus before Judge Peters, the United States district judge in Philadelphia. Judge Peters was timid, and hesitated. He reviewed the papers, and granted a decree, but he would not enforce it. Then John Marshall became Chief Justice of the United States Supreme Court. The case was carried to him, and you will find in *U. S. vs. Peters* (5 Cranch Rep.) one of the most expressive, clear and decided utterances of which his great mind was the author. He mandamused Judge Peters to proceed. Judge Peters obeyed, reluctant though he was.

In the meantime the fund arising from the sale of the sloop had gone, part of it into the treasury of Pennsylvania, through the hands of David Rittenhouse, the great astronomer, who was the first American to make an observation of the transit of Venus. He was state treasurer, and had part of the fund, Olmsted's third. But it was sufficient to trace the fund into the hand of the state. The consequence was, that Rittenhouse being in his grave, an action was brought against his executrices, his daughters. Lewis went so far, finding that Judge Ross had participated in the dissipation of the fund by ordering two thirds of it to be paid to others, as to sue the executors of the judge in Lancaster County; and secured a judgment against the executors. Chief Justice

McKean, also a Signer of the Declaration of Independence, promptly reversed it, on the ground that a county court could not take jurisdiction of a case which originated in admiralty, that jurisdiction now being in the United States courts.

You can see that though all this is a mere question of fixing jurisdiction, yet we are approaching the settlement of a very interesting controversy. Very well. Now, when Judge Peters issued his execution it was placed in the hands of the Marshal of the district for enforcement. Rittenhouse was in his grave. The defendants were two ladies, Mrs. Sargent and Mrs. Waters. They lived at the corner of Seventh and Arch Streets in Philadelphia. When the Marshal went there to execute his writ he found that the Governor of the State had called out a regiment of soldiers to protect them. There stood Pennsylvania bristling in arms against Federal authority. It was under Madison's administration, and civil war in miniature was threatened. These ladies were helpless, powerless, intimidated, shuddering behind their doors as to the meaning of the soldiery around the house. When the Marshal found that bloodshed might ensue he quietly withdrew, but summoned a posse to meet that day two weeks, in order to postpone the time for action, so that in the meantime he might resort to strategy. During the next ten days he disguised himself very cleverly as a farmer coming into town to sell poultry, and in that way got into the kitchen of the old ladies. He made them his prisoners and carried them off. He landed them in jail, and instantly they applied to Chief Justice Tilghman of the Supreme Court of Pennsylvania, for a writ of habeas

corpus for relief. Judge Tilghman in a well reasoned opinion decided that a state court could not touch a decree of a United States court; John Marshall had said that the decree should be executed, and executed it should be; and he remanded the ladies to the custody of the Marshal.

Then the Governor summoned the Legislature in special session, and they quickly relieved the situation by making an appropriation payable instantly in order to relieve the ladies from the consequences of their father having had possession of state funds. But the matter did not end there. The money was paid, but there followed a prosecution which was tried before Mr. Justice Washington, a nephew of General Washington, a United States Supreme Court justice—the trial of General Michael Bright and his officers—for having under state authority forcibly attempted to resist Federal authority. The jury did not want to convict. Two or three of them fell sick. The judge said, the case is clear; we will send you a doctor, but we won't allow you to separate." After some days they came to the conclusion that they had better agree, and they convicted the prisoners. The officers were sentenced to imprisonment and to a fine. Then President Madison, in order to relieve the situation, recognizing the fact that the officers had acted under a sense of mistaken state authority and allegiance to the state, remitted the fine and the controversy was over.

This case illustrates an astonishing evolution of Federal authority, beginning at a time when the Continental Congress was absolutely prostrate at the feet of the states, when its authority was defied. It terminated in the com-

McKean, also a Signer of the Declaration, promptly reversed it, on the ground that the court could not take jurisdiction of a case in admiralty, that jurisdiction resting in the States courts.

You can see that though all the time was fixing jurisdiction, yet we are aware of a very interesting controversy which arose when Judge Peters issued his execution to the hands of the Marshal of the State. Rittenhouse was in his house with two ladies, Mrs. Sargent and Mrs. Rittenhouse, who lived at the corner of Seventh and Arch streets in Philadelphia. When the Marshal came to execute the writ he found that the Governor had sent out a regiment of soldiers to protect the State. Pennsylvania bristling in arms. It was under Madison's administration that the power of the Federal Government in miniature was threatened. The Federal Government was powerless, intimidated, shrank from the meaning of the situation. When the Marshal found that he quietly withdrew, but stayed in Philadelphia two weeks, in order to see that the situation was so that in the meantime he could do his duty. During the next ten days he was as a farmer coming into the city. He way got into the kitchen and found his prisoners and carried them to jail, and instantly they were taken to the Supreme Court of the United States.

to a committee. They held a hearing at the
tonton, in New Jersey. The States made a
tent agreement that the judgment of the com-
ould be final, and that no reasons should be
the decision. The decision was unanimously
of Pennsylvania, that Connecticut had no
there was a settlement of the boundary dis-
had raged from 1761 until the year 1785.

With those two illustrations before us we can
y of a great hope, the investiture with author-
international tribunal to settle disputes between
sovereignities and with power to enforce the
because it is the enforcement and that only,
power and life to judicial determinations.
I think that it is a matter of mere national
our part, or any over-exaltation or self
of our own, when I declare that the Consti-
the United States, in its division of power
three great Departments, the Executive, the
and the Judicial, resembles as closely as the
human hands can do, the architecture of the heav-
all our sovereign States revolve like planets
the Federal Constitution as a central sun.

That which energizes and sanctifies and blesses
administration of justice in our land. The voice
the Supreme Court of the United States is the harmony
Union. With no political power, no patronage,
at its command, the Court speaks through
gent force of a judicial decree, in accordance with
fidentious interpretation of the great instrument
is declared to be the supreme law of the land,

anything in the Constitution or the laws of any other state to the contrary notwithstanding. To this Court we owe it, that today we have grown in power and have planted schoolhouses and churches on the mountain tops and in the valleys and rejoice in the hymns of liberty that are sung by our children in response to the salutation of the stars.

So it is that we today, by the application of principles such as are advocated by this society, are extending our vision in the effort to give a newer, higher, truer, grander, more significant and more triumphant utterance to the thought, that the law shall be supreme, that the law is the standard and guardian of our liberty, that the law circumscribes and defends liberty: for to imagine liberty without law is to imagine every man with a sword in his hand to destroy him who is weaker than himself.

THE TOASTMASTER: I am prouder than ever that I was born in Philadelphia. No one but a Philadelphia lawyer could have done that.

The next speaker on the program is my brother in law Mr. Justice Riddell, of the High Court of Ontario—my brother in law by right of the fact that at the meeting of the Canadian Bar Association, in his city of Toronto last June, I was made an honorary member of the Association, and so can claim close kin to him, as I have always desired to do. In this Society Mr. Justice Riddell's voice has been heard from the very first. In the proceedings of 1910 I read a most admirable address by Mr. Justice Riddell, and when I got into the conference today for the first time, and for a short time, what I heard had a very

familiar sound. It seemed to me to be quite on the plane of that address of 1910. Mr. Justice Riddell has not only spoken here but has spoken in Canada for the object of this Society for the establishment of the Supreme Court of the World, and there as here what he says is heard and has marked effect. We shall be only too glad to hear from Mr. Justice Riddell.

THE PRESENT OUTLOOK

It is the convention to begin an address on occasions of this character by expressing delight at being present; but it is not for that reason that I say that I am more than glad to be permitted for the third time to take part in the proceedings of this Society.

I have had some difficulty in persuading some of my friends at home of the propriety, the seemliness, of a Canadian, whose country is at war, who is proud that his country is at war, attending the sessions of a society whose function it is to prevent war and to substitute for war with its horrors another, a more humane and civilized method of settling disputes of an international character.

But this our Society was founded and had begun its beneficent work, years before the commencement of the present war; it has no thought of interfering with the course of the war (were it otherwise I should not be here).

For as

We draw the sword to keep our troth
Free from dishonour's stain;

We Pray

Make strong our hands to shield the weak,
And their just cause maintain.

Our Society has not varied from its original objects—nay its avowed purpose is the same as the avowed object of the Foreign Secretary of Great Britain in July, 1914, before the war broke out. Of his sincerity and good faith, we Canadians have no doubt; but the record is open, let everyone, neutral or belligerent, judge for himself.

It is therefore wholly fitting for the citizen of a country which asserts that its responsible statesman wholeheartedly desired and in good faith urged that the dispute which had arisen, so far as it was not composed by the two parties, should be referred to a Judicial body at The Hague—that the citizen of such a country, I say, should be a member of a society for settling all international disputes in that way, a way which commends itself to the intelligent, the civilized, the humane, the Christian.

I was a little criticized by some of my friends in Canada because I represented my Country at the celebration of the Centenary of the Battle of Plattsburgh and of that of New Orleans. But there, too, my skirts are clear, my reason perfect. I gloried not in the battles in which my peoples suffered defeat (no dishonorable defeat, be it said) but in the fact that these battles were a hundred years in the past, that the one made peace possible and the other made peace palatable and therefore permanent; that thereafter the two peoples had decided their disputes not by arms, by blood and agony and death, but by the peaceful ways of diplomacy and contract—by making bargains and sticking by them; by interpreting these bargains when they disagreed, not by rifle and cannon, shot and shell, but by the legal acumen and skill of the erminent Judge or the practical sense of the conciliatory arbitrator.

In the consideration of the only proper and logical causes of disputes concerning international rights, there are two fundamental elements which must always be borne in mind. There is national feeling, national sentiment, national pride, national predilection, call it what you will—*kultur* if you like—which every nation possesses in a greater or less degree, and which impels us to look upon all things from a national standpoint—to magnify national rights of the one nation, and to minimize the rights of all others. This is the fount of the spirit which says: "What my nation wishes is right, what it wants it must have, there is no law but my people's will, let all other nations great and (especially) small make way for them."

Then there is the other concept of which no nation is absolutely devoid; of which every nation claims a great share, and would like the world at large to think it has more than is always manifest; there is the sense of the right, the essentially right, the moral law implanted essentially and ineradicably in every human heart. Kant, speaking of this sense of law, which most of us conceive as coming direct from God himself, compares it with the starry heavens and finds them both sublime:

Two things do fill my soul with speechless awe,
The starry heavens and mankind's sense of law.

It is by the action, reaction and interaction of these two principles that the nation's view of international relations must be determined.

In my mathematical days I took delight in Conic Sections—what this degenerate age is wont to call Ana-

lytical Geometry. There were set forth, enunciated, elaborated, established, the properties of the ellipse. With two coördinate foci, the shape of the ellipse is determined by their relative distance apart. Remove the foci from each other, the ellipse becomes more and more flattened, less and less like a circle, until it is almost a straight line; approach the foci and the closer they come the nearer the figure comes to the circle, until when they coincide all ellipticity disappears and the perfect circle emerges, uniform in all directions, curving alike everywhere.

Let us conceive of the two principles of which I have spoken as the foci of the ellipse of the national concept of international duty. We find that as they are removed from each other, the view of international duty will become more and more narrow, that it more and more looks only in the one direction and has less and less dimension in any other. But let the national spirit come close to the eternal right, the everlasting justice, the moral and fundamental law implanted in the very soul of man, and the view will become broader until at length it stands forth facing all the winds of heaven alike with the same countenance, and, like the judgments of the Lord, true and righteous altogether.

A nation in which the national spirit is far removed from the justice of God may indeed glory in war. It can look but in the one direction and may justify war as necessary to attain its desires; it may indeed consider war not only necessary to crush opposition to its aims and objects but also as noble in itself because showing the power of the State and the devotion of the citizen.

But a people which has its national spirit thoroughly imbued with the impelling thought of justice can take no delight in war. War, the *ultima ratio regum*, may indeed interpret a law of man—it is sometimes said that the American Civil War interpreted the Constitution of the United States—but no war, no force, can interpret a law of God; can make that right which was wrong before. If what is just be all that is desired, war will be looked upon with disfavor—nay, abhorrence; for what distorts the sense of justice like armed conflict?

I am wholly persuaded that the century of peace, the glory of your people and mine, has been rendered possible, nay inevitable, by the two people measuring their international rights with God's yard-stick, His eternal and immutable law; that they have prayed with Job; "Let me be weighed in an even balance that God may know mine integrity."

Not that such a nation will wholly escape war; it will and must strive against it, but there may come a time when war cannot be avoided. I hate violence as much as any man; but I would not if I could help it allow a thief to rob me, even if I had to use violence; if a housebreaker persists in breaking into my house I will shoot him without a qualm if no other means is possible to keep him out. Because I believe in Courts, I do not drive the policeman away from my street corner and I do not complain if he carries a night-stick.

In this place I express no opinion as the cause of the present war—the record is open and everyone must judge for himself—and I have been too long at the Bar and on the Bench not to know that every case has two sides.

If, as they claim, the Germans desiring peace had no other way to prevent an unjust and unprovoked invasion of their country than to declare war and press offensive warfare against an aggressor, they had a perfect right to do so, and no reproach can be made of that action; their conduct was in accord with the highest law.

So, too, if Britain entered the war to keep her pledged faith, to defend the helpless and to prevent the destruction of a peaceful and peace-loving people—and that we proudly claim and we firmly believe—if she used every honorable means to avoid the terrible conflict—and that we proudly claim and firmly believe—then had she acted otherwise, she would have been an object of scorn and contempt, a by-word and a perpetual hissing among the nations of the earth, forgetful of her past, marred as it is by some faults, but on the whole of dignity, justice and righteousness. And that is why Canada, free to choose for herself, without compulsion, physical, legal or moral, at once pledged every last man and every last dollar in the cause we are supporting.

A peaceful non-military people, loving peace as the apple of the eye, we are therefore not ashamed to be at war. We ask no sympathy, except such as comes from a calm and dispassionate consideration of the facts themselves. If our conduct be such as to commend itself to the judgment instructed in the facts, we welcome sympathy; if not, we do not desire it. Above all we spurn sympathy which is but another name for pity. We have no desire that this Republic shall be aught but neutral—it is better so—but we do not desire that that neighbour at peace shall pity us because we are at war. We are

proud that we are at war and that Canada has found her soul.

Blow, bugles, blow! They brought us, for our dearth,
Holiness, lacked so long, and Love and Pain.
Honour has come back, as a king, to earth,
And paid his subjects with a royal wage;
And Nobleness walks in our ways again,
And Canada has come into her heritage."

Few of us there are who have not those near and dear to us at the front; many have suffered the loss of son or other kin; but we refuse to repent.

When the ends of this war are attained, but not sooner, peace will come again. Peace will come in time, and Canada will welcome it with a full heart; but never again will she allow her soul to be corroded with the rust of material success, or infected by the poisonous, sordid love of money.

Many there are who despair of civilization, whose hearts wrung by the horrors of the present war, are down-cast, as there appears to them no reasonable prospect that wars will ever cease.

I cannot think their despair warranted.

The last time I attended a banquet in this room, Dr. David Jayne Hill told a story which burned itself into my mind. I have not forgotten it—I cannot forget it. He said: "Sitting under the shadow of the Cologne Cathedral on a night in August after having dined in the open air on the terrace, I saw a little boy coming along with a great roll of broadsides under his arm, swinging one out in his hand and saying, in German of course; 'Proclamation by the Czar of Russia.' Everybody was

excited; everybody wondered if it was a proclamation announcing some great calamity, perhaps a declaration of war. Everybody bought a copy of the broadside. I bought one, glanced over it and in a moment realized that it was a copy of the rescript of . . . the Czar of Russia inviting the nations to assemble in an international council in order to arrest the progress of the armament of nations. In five minutes after the sense of that document had been comprehended by those who read it . . . everybody was smiling,—and it was a smile of indifference. I did not see one countenance expressing any serious appreciation of the purpose of the rescript . . . It seemed to mean nothing.”

Of a surety the Chancellor, Von Bethmann-Hollweg, did not exaggerate when he said the other day: “We never concealed our doubts that peace could be guaranteed permanently by international organizations, such as arbitration Courts.”

That picture of what took place on the Cathedral terrace impressed me strongly, it haunted me; I felt that sense of having heard it all before which ever now and then we all feel and cannot account for. At length it flashed upon me that I *had* heard it before, that the same thing happened on Calvary nigh nineteen centuries ago, when they that passed by wagged their heads and jeered: “If thou be the Son of God, come down from the Cross.”

Not only in Cologne, but also in Paris and in London, yes, in Ottawa, it is possible in Washington, too, there were those who ridiculed the thought that anything good could come of any movement looking to the prevention of war by international agreements or other peaceful means.

If a rescript of the Czar of Russia looking toward reduction of armaments or, however indirectly, toward preventing war, should now be presented to the populace in front of Cologne Cathedral, would they all smile a smile of indifference? Would it be looked upon as "another piece of sentimentalism, another exploit of imperial impulsiveness?" And would the diplomatic world treat it with "quiet, courteous disregard?"

What does it mean when the Chancellor, no doubt with the full approval of his Imperial Master, says: "If at and after the end of the war, the world will only become fully conscious of the horrifying destructions of life and property, then through the whole of humanity there will ring out a cry for peaceful arrangements and understandings which, as far as is within human power, will avoid the return of such a monstrous catastrophe. This cry will be so powerful and so justified that it must lead to some result."?

And what mean the words of Lord Grey?

"I think public utterances must have already made it clear that I sincerely desire to see a league of nations formed and made effective to secure future peace of the world after this war is over. I regard this as the best, if not the only, prospect of preserving treaties and of saving the world from aggressive wars in years to come. If there is any doubt about my sentiments in the matter, I hope this telegram in reply to your own will remove it."

Of Lord Bryce?

"London

Ex-President Taft, New Haven, Conn.:

Those working here on your lines send heartiest sympathy with and best wishes for your League's efforts.

BRYCE."

Of Premier Briand?

"In basing your effort on the fundamental principles of respect for the rights and wishes of the various peoples of the world, you are certain of being on common ground with the countries who, in the present conflict, are giving their blood and their resources, without counting the cost, to save the independence of the nations."

You may say that the utterances of one or of the other are wrung from him by the agony of a bleeding country and the bitter disappointment of defeat, actual or prospective. Be it so, if you will,—is it not a great thing, a splendid omen, that such words are said at all?

Let us not despair. I repeat what I said in another place before the war began: "No doubt the watchman on the tower will often hear the anxious question, 'Watchman, what of the night?' before, looking eastward he can say, 'The morning cometh,' without adding 'and also the night.' But that answer will be made. Weary hearts looking for world peace will again and again be saddened by wars and rumors of wars; but these must cease at length. Christ died upon the tree to save mankind, and nineteen centuries after his sacrifice but the fringe of heathendom has heard the good news; yet his kingdom is secure, his throne as the days of heaven."
. . . . Peace "must triumph or all moral governance of the Universe is impossible. Far, far back the

Hebrew prophet saw what must come to pass unless there is nothing but blind chance. 'The government shall be upon his shoulder and His name shall be called Wonderful the Prince of Peace. Of the increase of His government there shall be no end The zeal of the Lord of Hosts will perform this.'"

Even if there is not to be world peace, there may at least be peace so far as your great nation and mine are concerned. The United States does not need to show its power; its glory is gained and is imperishable, it can be diminished only by the United States itself; the altruism exhibited in the case of Cuba, the ardent love of peace exhibited in bringing about the Conference and Treaty of Portsmouth are all to its credit. You and we have lived side by side at peace. We are near, very near neighbors; we have four thousand miles of international boundary without a soldier or a fortification; we have hundreds of square miles of international waters for nearly a hundred years unpolluted by the keel of a ship of war. As very brethren we have lived thus far for a century without war; and we are determined that that century shall become another century, and another, and another, yea, till time shall be no more, for sooner shall the earth be shaken out of her place and the pillars thereof tremble than that a peace which is based upon righteousness shall be broken, and He who cannot lie has said: "the work of righteousness is peace and the effect of righteousness, quiet and assurance for ever."

THE PRESIDING OFFICER: I rejoice that Mr. Justice Riddell has brought us the voice of the new Canada which some of us have seen there, with that wonderful

new national spirit, that wonderful self-sacrifice and devotion which is part of that heroism found in the other countries, which is the silvery lining to this terrible cloud. And I hope, Mr. Justice Riddell, that before very many years, in fact before very many months, we may be celebrating together the centenary of peace between the United States and the British Empire, which celebration has simply been arrested by the war.

For twenty years no one has more admirably represented in Congress the best sentiment of this country with respect to international relations, justice between the people, than Mr. Slayden of Texas, happily returned by a majority which carried him five thousand beyond his brethren on the Democratic ticket in his district; and no one I am sure whether as a member of Congress, a member of the Interparliamentary Union of the Congresses of the World, a trustee of the Carnegie Foundation for Peace, or a member of this Society can better interpret its great purpose—Mr. Slayden.

REMARKS OF HONORABLE JAMES L. SLAYDEN

Mr. Toastmaster, ladies and gentlemen, when the Toastmaster was rattling off those honors that have been put upon me by circumstances rather than personal merit, I thought for a moment he was going to read the titles of the late Francis Joseph of Austria.

I think that I have been peculiarly unfortunate recently in my associates, in meetings like this, in the gentlemen with whom I have had to speak on several occasions. Twice recently I have had to speak from the same platform with

Mr. Bryan. I knew that it was an unfortunate thing for me, and a painful contrast and experience for the audience. Today when I heard Mr. Justice Riddell, I knew that my troubles were thickening. Tonight when they got this wonderful ally, this extraordinary machine gun of eloquence from Pennsylvania I knew that I had reached my Waterloo.

I cannot explain why I am here tonight except it be that I am a sort of professional peace agitator, as the Toastmaster has advised you. This is particularly an assembly of lawyers, of practitioners at the bar, and gentlemen who are learned in the law, or who are assumed to be. And why the presence and speech of a layman should be invited, I don't know, except it be due to the ignorance of our friend, the President of the Society, as to my limitations. But you may be interested in the view of a layman, on the Supreme Court. Having had twenty years' experience in Congress, and been favored by a confiding constituency with a commission for another two years, I have naturally become very much interested in these questions, and in the methods of the people who stand for peace work. I had a few doubts and qualms about this particular meeting, but none whatever, when I realized that gentlemen who are supposed to be engaged in working for ideals, come in with the methods of the machine politician, and while they pretend to go through the form of an election, present a slate and have it unanimously elected by the vote of one man.

Being in such company as that, and having regard for the patience of the audience, I have as a matter of prudence, written down what I have to say about the

Supreme Court. I do not want to get into contempt with that august body.

While the Supreme Court of the United States has had many eulogists no branch of our Government has less need of such service. The work of that majestic tribunal speaks for itself and commands the approval of the people whom it serves. More than a century of usefulness has so fixed it in the respect and confidence of the American people that it is rarely the object of adverse criticism. Presidents and presidential candidates do not escape criticism, and should not, and Congress is constantly dodging, but the Supreme Court goes serenely along doing its duty interpreting the law and undisturbed by public clamor.

Of course it is not wholly exempt from harsh criticism, no human institution is, but such as is heard usually comes from that part of the community which if not part of inclines to sympathy with the lawless element. It is still true that no actual or probable transgressor, individual or associated,

E'er felt the halter draw,
With good opinion of the law,

nor of judges who enforce it.

The Constitution declared and undertook to secure the liberties of the people and the sovereignty of the States but sometimes a legislative body that I can ill afford to criticise, swept along by the passion of the moment, yields to a popular but thoughtless demand and forgets that venerable instrument, and then the highest and most useful privilege of the Supreme Court comes to the res-

cue of the people. Thank Heaven for the Supreme Court and for the fact that it dwells on the mountain tops of law.

But, Mr. Toastmaster, my thought tonight is not of the Supreme Court as guardian of the liberties of the American people and preserver of peace between the States, but of its value as a model for another court that peace loving and thoughtful people throughout the world now regard as a necessity and believe to be a blessed possibility of the near future. It is of the growing importance of our great court as a pattern for a distracted and war cursed world that I am thinking.

The necessity for some sort of tribunal, majestic, dignified, all powerful, with the civilized countries of the universe for its constituents, to pass on the serious disputes of the nations is recognized alike in Europe and America. The suggestion of a Supreme Court of the World, limited in its jurisdiction to the settlement of controversies between the nations, and in many respects like our highest court, has come from both sides of the Atlantic. It flatters us as Americans and it opens a vista of hope.

Modern civilization insists that we substitute a judge for the sword. All history shows that the soldier has failed to maintain peace. It is time to try some other plan, and none makes such an appeal to the intellectual world as a court to which the allegiance and obedience of the world shall be pledged.

As long as an enthroned megalomaniac, or ambitious politician, who covets his neighbor's commerce and territory, has the power to declare war and move armies and

navies at will the masses are not safe. The power to make war without incurring the displeasure and possible hostility of the world at large must be taken from them. In the interest of the people who toil and sweat, who fight and pay, it must be taken from them.

The world wide tendency to democracy is impressive. Those of us who believe in it, and all true Americans do, must be alert to its interest if its progress is not to be impeded. It is easily arrested by war and the mental paralysis that accompanies war. The only exceptions to this rule that I can think of now are the wars of the people to compel recognition of their right to a share in government, and they have been few. The battlefield is a breeding ground for dictators and autocrats and on it the liberties of the people have perished.

If we are to have democracy, the rule of the people, we must have peace and the reign of law, and so, in the effort to find a solution of these problems, men's minds turn at once, and instinctively, to that sort of body which represents law and of which in all the world our Supreme Court is the most noted and practical exemplar. Questions between American sovereign States that might lead to war are settled in its decisions and not one ever thinks of an appeal to arms. Why not expand this benevolent practice in the interest of humanity to all other sovereignties?

If I understand the purpose of your Society for the Judicial Settlement of International Disputes it is to bring about just such a condition. The League to Enforce Peace has the same object in view but with less reliance on public opinion and more on the policeman.

My own belief is that when the judgment of a World's Court is pronounced it will, like the shot of the embattled farmers, be heard round the world. It will be heard above the din of battle. Some kings may be deaf, but it will go over the highest mountains, cross the widest seas and penetrate the consciousness of the masses and the decree of such a court will be sustained by the public opinion of the world. And woe to the man, even if he wear purple, who fails to obey its judgments.

THE TOASTMASTER: I am very sure that before the clock strikes again we should like to hear, as the last word, a sort of benediction, shall I say—good word (that is a perfectly proper word to use) from Dr. James Brown Scott, one of the founders of the Society, and the man who has done more, as most of us believe, than any other one to advance the cause of the World Court, which by its judgments, by its wisdom, by its reasoning, by its authority, based on its wisdom and its reasoning, and backed by the international public opinion to which Mr. Slayden has just referred, shall come to be the settler of the troubles which vex nations, in so far as they can be settled by a court. I am sure we should all like to hear from Dr. Scott.

REMARKS OF DR. JAMES BROWN SCOTT

Mr. Toastmaster, to your last remark there is at least one person who would interpose an objection, and I hesitate to look at her; otherwise I am sure I could not have the courage to attempt to say even a few words here tonight, after the very remarkable addresses to which

we have listened, I am sure, with admiration and with despair. However, as you have been good enough to call upon to me say a few words, I shall comply as best I may with your request, by explaining briefly the great opportunity that seemed to be within our grasp upon the outbreak of this great European, and I may say world-wide calamity.

There had been a great struggle at The Hague in 1899 to establish a very remarkable institution, a first step, a so-called permanent Court of Arbitration, to which the nations might resort for the settlement of such disputes as they were minded to submit to it. In 1907 at the second Hague conference a further step was taken in the adoption of a convention providing for the creation of a true permanent Court of International Justice, not to supplant the Court of Arbitration but to supplement it, and by its existence to offer two guarantees of peace by justice and through justice.

Shortly before the outbreak of the war which is still running in terrible force, a movement was on foot to secure the establishment of this court which had been accepted in principle at the second conference. Three of the states to the conference had pledged their word to the establishment of this tribunal. The great powers, eight in number, had agreed to coöperate, and his excellency the Netherland Minister of foreign affairs, had decided to take the initiative by offering to these powers, and to such others as might care to join them, the hospitality of the Netherlands, and the Peace Palace in which to install this truly permanent international court of justice. But before the nations could be sounded, and

before they could be brought by their representatives into conference at The Hague, the war broke out, and what had been so auspiciously begun was delayed.

Was it lost for the moment? Yes. But not for the future. It is inconceivable that those nations which have gone through the horrors of the great war would willingly expose themselves to a repetition of such a struggle and such an agony, during the lifetime of the present generation. It is inconceivable that those people should wish to expose their children to the horrors which they themselves have suffered.

In these two lies I believe the hope of the immediate future, that the nations which have suffered may be willing to take the steps necessary to settle, or to propose an agency for the settlement, of their disputes, just as the thirteen states of the American Union created an agency in which they consented to be sued in all matters sounding in law or equity. And that the children finding in existence this agency will utilize and perfect its deficiencies, so that, just as this country of ours, composed of forty-eight states, sovereign and independent in the matter of justice, find themselves in possession of an agency which settles, according to principles of justice, the disputes that arise between them, the society of nations consisting of an equal number of sovereign and independent states may create and find in their midst an international court of justice.

That the war may soon end, that all the nations now standing opposed to one another, may be able soon again to take up the threads of life and to coöperate for the benefit of mankind, and that within the lives of those now in

being, an agency of the nations for the settlement of their justiciable disputes, shall be created, is, I believe, the hope of all, not merely the benefactors of their kind, but the believers in an elevated, progressive humanity.

MR. MARBURG: Mr. Toastmaster, I want to offer the profound thanks of the members of this Society to the speakers this evening and to the speakers throughout this memorable convention. It has been one of the most notable, and will so prove, of all the meetings this Society has had. The interesting program is due to the Secretary of the Society, but he and the other officers of the Society want to confess that they are held to their duty by one individual who carries largely the burdens of this organization—and that is Mr. Tunstall Smith. And I want to include in the vote of thanks, his name.

THE TOASTMASTER: It is moved and seconded by one of the founders of the Society, the retiring President, that a vote of thanks be given to all the speakers of the evening for their admirable addresses, and to all the speakers of the conference for their excellent contributions; and also especially to the secretary of the Society, and to Mr. Tunstall Smith, assistant secretary, for the arrangements which have worked out so admirably.

(The question was taken, and the motion was unanimously agreed to.)

THE TOASTMASTER: We end the conference, memorable in so many ways with the high note of hope, like the voice of the bird in the dark and cold December, singing "We are nearer the spring than we were in September."

APPENDIX A

REPORT OF THE COMMITTEE UPON THE DUTY OF COURTS TO REFUSE TO EXECUTE STATUTES IN CONTRAVENTION OF THE FUNDAMENTAL LAW¹

To the New York State Bar Association:

The undersigned, the special committee upon the duty of courts to refuse to execute statutes in excess of or in contravention of the fundamental law (copy of resolution appointing which is hereto annexed and marked Exhibit A), respectfully report as follows:

Your committee has received much historical information from Justice Rousseau A. Burch of the Supreme Court of Kansas, Justice Oscar Hallam of the Supreme Court of Minnesota, Professor Corwin of Princeton University, Professor Haines of Whitman College, Professor McLaughlin of the University of Chicago, Professor Roscoe Pound and Dean Thayer of the Harvard Law School, Charles A. Boston, Esq., of New York city, and from many other representatives of all the three different points of view as to the duty of courts when statutes conflict with the fundamental law; it has sought for and found much printed, but heretofore forgotten or undiscussed historical evidence; it has sent a questionnaire to the leaders of thought and action among those who advocate the view that it is a judicial usurpation or extra legal act for any court to hold a law unconstitutional or *ultra vires* (which questionnaire, together with the most representative answers thereto, is hereto annexed and marked Exhibit B); and it has also sent a questionnaire to representatives of the leaders of thought and action among those who advocate the view that the American doctrine of judicial review of statutes in contravention of the fundamental law is unique and archaic and should, therefore, be abolished, restricted or curtailed (which questionnaire, together with representative answers thereto, is hereto annexed and marked Exhibit C).

Your committee further respectfully reports:

¹ Presented at the Thirty-eighth Annual Meeting of the New York State Bar Association, held at the city of Buffalo, on the 22nd and 23rd of January, 1915.

HISTORICAL VIEW OF COURTS REFUSAL TO EXECUTE UNCONSTITUTIONAL
LAWS

Two novel historical views (accompanied by the archaic and inefficient procedure of most American courts as well as by the archaic procedural provisions of the constitution drawn to conform to the eighteenth century outgrown common law theory that no interested witness could testify in any civil jury trial, and no defendant accused of crime could testify at all) have done much to cause the present popular discontent with the enforcement of the constitution by the courts.

Many radicals assert that our federal democratic republic should consist of forty-nine legislative units or absolutisms (one federal and forty-eight states), without any federal council or any other arbiter to settle the inevitable conflicts and enforce the constitutional bills of rights. Other radicals assert that a series of state plebiscites upon state court decisions against those whose supporters can obtain sufficient signatures to initiate state referendums thereon should be substituted for the present system of the enforcement of the constitution and bills of rights contained therein by the state courts. Many of the supporters of the state plebiscites or referendums who are not lawyers overlook the fact that under the federal constitution it would be the duty of both state and federal courts to enforce the federal constitution notwithstanding state plebiscites to the contrary.

Chief Justice Walter Clark of North Carolina, Dean William Trickett of Dickinson Law School, Senators LaFollette and Owen, the late Mayor Gaynor, Judge R. M. Wanamaker of the Supreme Court of Ohio, Allan L. Benson, Louis B. Boudin and Gilbert E. Roe, lead those who go still further and assert that the power the courts have exercised since the declaration of independence and before the promulgation of the federal constitution, to refuse to execute statutes in violation of the fundamental law, is a judicial usurpation or extra legal act.

Allan L. Benson, *The Usurped Power of the Courts*, 3-5, 7-53, 61-3; *Our Dishonest Constitution*, 57, 75-6, 88.

Louis B. Boudin, *Government by Judiciary*, 26 *Political Science Quarterly*, 248-9.

Walter Clark, Chief Justice of North Carolina, *Address of April 27, 1906*, pp. 10-14; *Address of January 27, 1914*, *Government by Judges*, pp. 5-12, 17-8.

William J. Gaynor, *Our Courts and Social Progress*, 28 *Bench and Bar*, 1912, pp. 102-6.

Robert M. LaFollette, *Introduction to Gilbert E. Roe, "Our Judicial Oligarchy,"* p. VI.

Senator Robert L. Owen, July 31, 1911, *Congressional Record*, Vol. 47, pp. 3367-8.

- Gilbert E. Roe, "Our Judicial Oligarchy," 17, 23-9.
 Dean William Trickett, Dickinson Law School, The Great Usurpation, 40 American Law Review, 356-76.
 R. M. Wanamaker, Judge of the Supreme Court of Ohio, Illinois State Bar Association Year Book for 1912, pp. 179, 181-185; The Man on the Bench, Saturday Evening Post, September 26, 1914, p. 36.
 Matthew J. Wheelahan, N. Y. Law Journal, November 7, 1914, editorial page.

The Socialist National Platform of 1912 reads:

"Political Demands. * * *

The abolition of the power usurped by the Supreme Court of the United States to pass upon the constitutionality of the legislation enacted by Congress."

Ex-President Roosevelt citing portions of the views of the late Professor James Bradley Thayer, who cited as his authorities the views of Bryce (1 American Commonwealth, 1889 ed., pp. 237-258), Dicey (The Law of the Constitution, 126-133), and Henry Wade Rogers (Constitutional History, Introduction, pp. 9-14), who followed the views of DeTocqueville (1 Democracy in America, 1862 ed., 123-30; 1889 ed., pp. 94-100), and President Wilson following the views of Bryce, Dicey and Maine (Popular Government, pp. 217-18), reached the conclusion as expressed by President Wilson (Constitutional Government in the United States, p. 147):

"Our constitutions are comparable, say Professor Dicey and Mr. Bryce, to the charters of great corporations, our statutes to their by-laws, our treaties to their contracts. No by-law or contract made by them will be upheld by any court if in contravention or excess of their charter powers. Any English speaking lawyer would have reasoned the matter out as we have reasoned it out.

None the less, plain inference though it be, this power of our courts renders our constitutional system unique. No other constitutional system has this balance and means of energy,—this means of energy for the individual citizen."

And further (p. 142):

"Our courts are the balance wheel of our whole constitutional system; and ours is the only constitutional system so balanced and controlled. Other constitutional systems lack complete poise and certainty of operation because they lack the support and interpretation of authoritative, undisputable courts of law."

Ex-President Theodore Roosevelt in the Outlook of January 6, 1912, says (Judges and Progress, p. 41):

"Under our American system of government the judge occupies a position such as he occupies nowhere else in the world, a position which really makes him, so far as the negative side of legislation is concerned, the most important legislative official in the country; for of course it is merely to repeat a truism

to say what was so well said by an English bishop two centuries ago, and * * * quoted * * * by Mr. Justice Holmes among others:

'Whoever hath an absolute authority to interpret any written or spoken laws, it is he who is truly the law giver to all intents and purposes, and not the person who first wrote or spoke it' In some most vital respects the judges have become far more truly the law givers than either the executive or the legislative bodies, State or National, can be. In no other country is this permitted as with us. In Germany, France, or England, when the people have spoken and have definitely declared their mind through the legislature, the courts carry out the popular wish and apply it as formulated in law. Here the courts decide whether or not that wish shall be granted, whether or not the people are to have their will. Surely none will contend that the judge is not the servant of the people; and it behooves us to look, carefully into any tendency to turn him into master instead of servant, so that the created rules the creator."

In the Introduction to *Majority Rule and the Judiciary*, by William L. Ransom, Mr. Roosevelt says (pp. 10-11):

"Consider the present practice in various countries in which there is substantially the same 'well ordered freedom' as in our own land—for instance, the republic of France—and various great English-speaking commonwealths of the British Empire, such as England and Canada, all of which are governed by their parliaments in substantially the same manner that we are governed. In these countries the decision of the legislature on constitutional questions is absolute and not subject to action by the judiciary, and whenever the courts make a decision which the legislature regards as establishing a construction of the constitution which is unwarranted, the legislature, if it chooses, can by law override that construction and establish its own construction of the constitution."

And further (p. 12):

"In England, Canada, and the other countries I have mentioned, no one dreams that the courts have a right to express an opinion in such matters, as against the will of the people shown by the action of the legislature."

The genesis of the view that the American practice of judicial review is either "unique" or "permitted," "nowhere else in the world," is stated by Mr. Roosevelt to be based upon the views of the late Professor James Bradley Thayer; probably meaning Professor Thayer's article *American Doctrine of Constitutional Law* (7 *Harvard Law Review*, 129-131).

Theodore Roosevelt, *Judges and Progress*, *The Outlook*, January 6, 1912, pp. 40-1, 46-7; *The Judges, the Lawyers and the People*, *The Outlook*, August 31, 1912, p. 1005.

Historically the genesis of the proposal for the recall of judicial decisions, with which the late Professor James Bradley Thayer's alleged view of the uniqueness of the American doctrine of judicial review of laws was linked during the campaign of 1912, seems to have arisen in the resolution introduced by Mr.

Holder of South Australia in the Australasian Federal Convention of 1898, to the effect that in the event of any commonwealth law being declared *ultra vires* by the high court, the executive may upon a majority vote of each house of the legislature, refer the law to a plebiscite of the electors, and if approved by them the constitution shall be deemed to have been enlarged, and the law shall be deemed to have been *intra vires* from the passing thereof. This resolution was withdrawn by Mr. Holder, after a debate in which it appeared that he had no supporters in the Australasian Constitutional Convention (II Official Record of the Debates of the Australasian Federal Convention (Melbourne, 1898), 1717-21, 1723-32; Moore, *Constitution of the Commonwealth*, 2d ed., 360-1).

In the campaign of 1912, the chief American disciple of Mr. Holder based his view as to the alleged uniqueness of American Court review upon the writings of the late Professor, whom he called Dean, James Bradley Thayer (*Outlook*, January 6, 1912, pp. 40-1; August 31, 1912, p. 1005). There is undoubtedly one paragraph of the late Professor Thayer's writings (7 *Harvard Law Review*, p. 130), which standing alone and separated from much that he elsewhere wrote upon this subject, might be literally read to mean that nowhere else in the world do the courts exercise the constitutional power they do here. Professor Thayer's son, the present Dean of Harvard Law School, has pointed out (in Senate Document No. 28, 63rd Congress, 1st Session; presented by Senator Nelson, May 14, 1913) that the late Professor Thayer did not advocate the recall of judicial decisions.

Did the framers of the Constitution of the United States and the State Conventions which ratified it, intend that the Federal Supreme Court should refuse to enforce federal and State legislation in excess of or in contravention of its provisions?

If not, by whom and how did they intend to enforce the provisions of the bill of rights in the first ten amendments to the federal constitution; also the anti-slavery, anti-peonage, equal protection of the laws, due process of law and equality before the law's provisions of the bill of rights contained in the 13th, 14th and 15th amendments; also by whom and how did they intend to determine conflicts between federal and state power?

If not, when the federal constitutional convention rejected the proposals for a council of revision to revise or annul laws (like the Privy Council and the Federal Council of the German Empire); also the proposal that Congress should have power to negative or annul State laws, did it do so in view of the State Court decisions refusing to execute unconstitutional State laws, the King's Bench decisions refusing to enforce acts of parliament in derogation of common right or the rights of Englishmen, and the Privy Council decisions refusing to enforce Colonial acts in derogation of the rights of Englishmen, in violation of the laws of England, or in excess of the Colonial charters?

Nearly every colonial lawyer and statesman, and many even of the Royal

Colonial Judges, approved these King's Bench and Privy Council decisions, upholding the constitutional rights of Englishmen. The Privy Council of to-day, as well as the High Court of Australia and the Supreme Court of Canada, frequently refuses to execute dominion, commonwealth, state and colonial laws in excess of or in contravention of the Act of Parliament creating the Dominion, Commonwealth, Union or Colony. The British Empire has been and is held together by the power of the Privy Council both in advising the disapproval of, and in judicially refusing to execute *ultra vires* Colonial laws. Under the Canon law throughout continental Europe during the middle ages, the national constitution and laws, including in England part of Magna Charta and several acts of Parliament, were refused execution wherever they conflicted with the so-called Canon law or liberties of the Church.

In short the American Revolution was a lawyer's revolution to enforce Lord Coke's theory of the invalidity of Acts of Parliament in derogation of common right and of the rights of Englishmen. When the framers of the constitution freed themselves from parliamentary absolutism, did they intend to substitute a consolidated congressional absolutism in national matters plus the absolutism of forty-eight State legislatures in State matters, without providing any tribunal to uphold the privileges of freemen as defined by them in the constitutional bill of rights, also to determine the inevitable conflicts between the Federal and State jurisdictions?

In pursuing this inquiry it will be seen that constitutional law, far from being inflexible, is a vital force and a living, growing thing. The Dred Scott decision (19 Howard, 393) perpetuating slavery and devitalizing the powers of Congress relating to the territories, was as to the perpetuation of slavery reversed by the thirteenth amendment and as to the limitation of congressional power in the territories it was practically overruled by *Downes v. Bidwell* (182 U. S., 244, 270-87).

On the other hand the righteous judgments of the King's Bench and Common Pleas that an act of parliament against common right and in derogation of the rights of Englishmen was void, which were followed in Bacon's, Comyn's and Viner's abridgments published about the middle of the eighteenth century, have been in Great Britain quietly superseded by decisions made after the American Revolution, ignoring the contrary decisions before the Revolution, and holding that parliament by virtue of the English Revolution of 1688 has been and is the Supreme power in the Kingdom of England, as well as its highest court under the name of the High Court of Parliament, whose acts, whether legislative or judicial, were as conclusive upon the inferior courts as are those of our court of last resort upon an inferior court or a justice of the peace.

I. United States Constitution, Art. VI, § 2:

"This constitution, and the laws of the United States which shall be made in pursuance thereof; and all treaties made, or which shall be made, under the authority of the United States, shall be the supreme law of the land; and the

judges in every state shall be bound thereby, anything in the constitution or laws of any state to the contrary notwithstanding."

Constitution, Art. III, § 2:

"The judicial power shall extend to all cases, in law and equity, arising under this constitution, the laws of the United States, and treaties made, or which shall be made, under their authority; * * * ."

The judiciary act was passed by the first Congress, the leaders of which in both houses were among the foremost members of the constitutional convention, and was signed by President Washington, who had been the president of that convention.

Judiciary Act, § 25 (1 U. S. Stat. at Large, p. 85):

"Sec. 25. And be it further enacted, That a final judgment or decree in any suit, in the highest court of law or equity of a State in which a decision in the suit could be had, where is drawn in question the validity of a treaty or statute of, or an authority exercised under the United States, and the decision is against their validity; or where is drawn in question the validity of a statute of, or an authority exercised under any State, on the ground of their being repugnant to the constitution, treaties or laws of the United States, and the decision is in favor of such their validity, or where is drawn in question the construction of any clause of the constitution, or of a treaty, or statute of, or commission held under the United States, and the decision is against the title, right, privilege or exemption specially set up or claimed by either party, under such clause of the said constitution, treaty, statute or commission, may be re-examined and reversed or affirmed in the Supreme Court of the United States upon a writ of error * * * ."

Thomas Jefferson's view that the Articles of Confederation were superior in authority to any State law, was upheld by the Supreme Court in 1809, when it refused to enforce a Pennsylvania State law purporting to annul the decision of a congressional court of admiralty rendered in 1778 under the Articles of Confederation. So that before the adoption of the Federal Constitution the duty of all courts to refuse to execute laws which were in contravention of the Articles of Confederation was fully recognized.

In 1787 Jefferson wrote John Adams:

"It has accordingly been the decision of our courts, that the confederation is a part of the law of the land, and superior in authority to the ordinary laws, because it cannot be altered by the legislature of any one State."

4 Life and Works of John Adams, 579-80, note.

1809. In *U. S. v. Peters* (5 Cranch, 115, 136-41) a Pennsylvania State law annulling the decision of a court of admiralty under the Articles of Confederation, was held unconstitutional.

Pennsylvania's appeal to President Madison to refuse to execute the judgment of the Supreme Court was declined by him (President Madison's letter to Governor Snyder, April 13, 1809, American State Papers, 2 Miscellaneous,

12); Pennsylvania's appeal to Congress and to the other States because it alleged that the Federal Courts had no power to review a State law; also for a constitutional amendment to prevent any more State laws from being reviewed by Federal Courts, was disapproved by eleven states, and the House of Representatives refused to print them by a vote of 63 to 50 (Ames State Documents on Federal Relations, Nos. 22-25; Annals of Congress, 1809, June 9, pp. 258-60; 131 U. S. Appendix, XXIX-XXXIV; The case of the Sloop Active, 7 Green Bag, 17-26; V. McMaster, History of the People of the U. S. 403-6).

II. Resistance to Parliamentary taxation of the colonies without representation, as unconstitutional, was the cause of the American Revolution.

William Pitt in opposing the Stamp Act said:

"It is my opinion, that this kingdom has no right to lay a tax upon the colonies."

3 Lecky, England in the 18th Century, 336, 365-70, 343, 353-54, 356-8.

1 Almon's Life of Pitt, 328.

Frederic Harrison, Chatham, p. 161.

3 Bancroft's History, pp. 176-8, 181-4.

4 Green, History English People, 1682-3.

The colonists believed they had paid more than their share of the taxes to carry on the French war, and had raised nearly 25,000 of the soldiers with whom, under Pitt's premiership, England had conquered Canada and Cuba, and had so relieved the British regulars that they were enabled to conquer the Philippines.

John Fiske, 1 American Revolution, 15.

Trevelyan, 1 American Revolution, 90-2.

3 Bancroft's History U. S., p. 84.

III. The American revolution was a lawyer's revolution to enforce the principle laid down in Lord Coke's, Lord Hobart's and Lord Holt's decisions that acts of parliament against common right or in violation of the natural liberties of Englishmen were void. Every colonial lawyer and some of the Royal Colonial Judges believed that Parliamentary taxation of the Colonies, without representation, although for imperial purposes, was unconstitutional. By the right of the sword, as John Adams put it (IX Adams Works, 390-1; McIlwain, High Court of Parliament, pp. 63, 309-10), the American Revolution established Lord Coke's view of the common law as the constitutional law of the United States. It must be borne in mind that after the repeal of the stamp act, the imperial import duty of three-pence a pound upon tea, which led to the American Revolution, was intended to be laid for the service of the Imperial Government to make a more efficient Colonial Government and ultimately to support a Colonial army under the control of the British Cabinet, and not in any way for the local relief or benefit of the British treasury.

3 Lecky, England in the 18th Century, 335, 343-58, 370-2.

In *Bonham's Case*, 8 Coke Rep., 114a, Lord Chief Justice Coke says (118a):

"And it appears in our books, that in many cases, the common law will control acts of parliament, and sometimes adjudge them to be utterly void: for when an act of parliament is against common right and reason, or repugnant, or impossible to be performed, the common law will control it, and adjudge such act to be void."

In *Day v. Savadge*, Hobart, 85, headnote:

"An act of parliament made against natural equity, as to make a man a judge in his own cause, is void."

Lord Chief Justice Hobart says (87 a-b):

"Because even an act of parliament, made against natural equity, as to make a man judge in his own case, is void in itself."

In *City of London v. Wood*, 12 Modern, 669, Lord Chief Justice Holt says (687):

"It is against all laws that the same person should be party and judge in the same cause * * *. The judge is agent, the party is patient, and the same person cannot be both agent and patient in the same thing; but it is the same thing to say that the same man may be patient and agent in the same thing, as to say that he may be judge and party; and it is manifest contradiction. And what my Lord Coke says in *Dr. Bonham's case*, in his 8 Co. is far from any extravagancy, for it is a very reasonable and true saying, That if an act of parliament should ordain that the same person should be party and judge, or, which is the same thing, judge in his own cause, it would be a void act of parliament; for it is impossible that one should be judge and party, for the judge is to determine between party and party, or between the government and the party; * * * but it cannot make one that lives under a government judge and party. An act of parliament may not make adultery lawful * * *."

6 Bacon's Abridgment Statute (A):

"If a statute be against common right or reason, or repugnant, or impossible to be performed, the common law shall control it, and adjudge it to be void."

"It has been holden, that a statute contrary to natural equity, as to make a man judge in his own cause, is void * * *."

*Comyns's Digest, Parliament (R. 27):

"So where the words of an act of Parliament are against common right and reason, repugnant, or impossible to be performed, they shall be controlled by the common law."

19 Viner's Abridgment, Statutes (E. 6), Construction of Statutes:

"15. It appears in our books, that in several cases the common law shall control acts of parliament, and sometimes adjudge them to be utterly void; for when an act of parliament is against common right and reason, or repugnant, or impossible to be performed, the common law shall control it, and adjudge it to be void."

In the famous case of *Monopolies*, 11 Co., 84, 86a-87b, Chief Justice Popham and his associates held that a grant of the exclusive right to manufacture playing cards within the realm was void as against the common law. Such a grant, although it was made by the crown, was in its essence only an act of legislation. It was a general prohibition. It forbade everybody but the patentee to manufacture, import or sell playing cards. The principle of the case was therefore an assertion of the judicial power to review the validity of legislative acts, whether by the crown or by the parliament.

1761. James Otis, *Writs of Assistance Cases*, Quincy, Mass. Rep., 474, says:

"As to acts of Parliament: an act against the Constitution is void: an act against natural equity is void."

(Quincy, 521-7, Appendix by the late Mr. Justice Gray):

"His" (Otis) "main reliance was the well known statement of Lord Coke in *Dr. Bonham's case*—'It appeareth in our books, that in many cases the common law will control Acts of Parliament and adjudge them to be utterly void; for where an Act of Parliament is against common right and reason or repugnant or impossible to be performed, the common law will control it and adjudge it to be void. (Coke Rep. 118a). Otis seems also to have had in mind the equally familiar dictum of Lord Hobart—'Even an act of Parliament made against natural equity, as to make a man judge in his own case, is void in itself * * * ' (*Day v. Savadge*, Hob. 87). Lord Holt is reported to have said, 'What my Lord Coke says in *Dr. Bonham's case* in his 8 Rep. is far from any extravagancy, for it is a very reasonable and true saying, That if an act of Parliament should ordain that the same person should be party and judge, or what is the same thing, judge in his own cause, it would be a void act of Parliament (*City of London v. Wood*, 12 Mod. 687).'

"The law was laid down in the same way, on the authority of the above cases, in *Bacon's Abridgment*, first published in 1735; in *Viner's Abridgment*, published 1741-51, from which Otis quoted it; and in *Comyn's Digest*, published 1762-7, but written more than twenty years before. And there are older authorities to the same effect. So that at the time of Otis's argument his position appeared to be supported by some of the highest authorities in the English law. (*Bac. Ab. Statutes*, A. Vin. Ab. Statutes, E. 6. pl. 15; ante, 51; *Com. Dig. Parliament*, R. 27 * * *). The same doctrine was repeatedly asserted by Otis, and was a favorite in the colonies before the Revolution."

See, also, 2 John Adams' Works, 525, appendix.

1765. John Adams, in his argument on the memorial of Boston to the governor and council, said (*Quincy Reports*, 200):

"The Stamp Act, I take it, is utterly void, and of no binding force upon us; for it is against our rights as men, and our privileges as Englishmen. An act made in defiance of the first principles of justice; an act which rips up the foundation of the British Constitution, and makes void maxims of 1800 years standing.

"Parliaments may err; they are not infallible; they have been refused to be submitted to. An act making the King's Proclamation to be law, the executive power adjudged absolutely void."

1776. John Adams' letter to William Cushing, June 9, 1776 (9 Adams' Works, 390-1):

"You have my hearty concurrence in telling the jury the nullity of acts of parliament, whether we can prove it by the *jus gladii*, or not. I am determined to die of that opinion, let the *jus gladii* say what it will."

1765. Hutchinson, the Royal Chief Justice of Massachusetts, in 1765, speaking of the opposition to the stamp act, said (Quincy, Mass. Reports, 527):

"The prevailing reason at this time is, that the act of Parliament is against Magna Charta, and the natural rights of Englishmen and therefore, according to Lord Coke, null and void."

On September 12, 1765, Hutchinson wrote (Quincy, 441):

"Our friends to liberty take advantage of a maxim they find in Lord Coke that an act of Parliament against Magna Charta or the peculiar rights of Englishmen is *ipso facto* void."

On February 7, 1766, Cushing, one of the Royal Associate Justices, wrote Chief Justice Hutchinson upon the question whether the courts should be opened without stamps (Quincy, 527-8):

"It's true it is said an act of Parliament against natural equity is void. It will be disputed whether this is such an act. It seems to me the main question here is whether an act which cannot be carried into execution should stop the course of justice, and that the judges are more confined than with respect to an obsolete act. If we admit evidence unstamped *ex necessitate* Q. if it can be said we do wrong."

1792. In *Bowman v. Middleton*, 1 Bay (South Carolina), 252, 254, it was held that an act of the Assembly of South Carolina passed in 1712, transferring a freehold from the heir-at-law of one Nicholls, and also from the eldest son and heir of John Cattell, deceased, and vesting it in a second son, William Cattell, was "null and void * * *," "such an act being against common right and the principles of Magna Charta."

Prior to the American Revolution so far were the English courts from sustaining the later doctrine of parliamentary absolutism, that in the reign of James II, ten of the twelve judges of England held that the King was an absolute sovereign. The change from Royal to Parliamentary absolutism shows that constitutional law is a living, growing thing.

In *Godden v. Hales*, 2 Shower, 475, headnote:

"The king of England might formerly dispense with any law, and therefore on a conviction on the 25 Car. 2. c. 2. for holding the office of colonel, without having taken the oaths, if the king granted the convict a dispensation, he might plead it in bar to an action by the informer for the penalty."

The Lord Chief Justice in delivering the opinion of all the justices of the

King's Bench, as well as of all the justices of the Common Pleas and Exchequer, except Street and Powell, said (478):

"The Kings of England were absolute sovereigns; that the laws were the king's laws; that the king had a power to dispense with any of the laws of government as he saw necessity for it; that he was sole judge of that necessity; that no act of parliament could take away that power; that this was such a law."

The views of Coke, his associate Justices and their patriotic successors prior to the American Revolution that Parliament was not omnipotent and that it was the duty of all courts to refuse to execute acts of Parliament in contravention of the natural rights and liberties of free Britons, were adopted not merely by patriotic leaders like John Adams, Samuel Adams and James Otis, but by colonial legislatures, colonial and town conventions, and innumerable colonial town meetings during a long series of years prior to 1776.

James Otis drafted the address of the colonial convention of 1765, or stamp act Congress, to the King, saying (Tudor's Life of James Otis, 227):

"To the English constitution these two principles are essential, the right of your faithful subjects freely to grant to your majesty, such aids as are required for the support of your government over them, and other public exigencies; and trial by their peers. By the one they are secured from unreasonable impositions, and by the other, from arbitrary decisions of the executive power."

The congressional petition to the House of Commons says (Tudor's Life of James Otis, 228);

"By these means, we seem to be in effect unhappily deprived of two principles essential to freedom, and which all Englishmen have ever considered as their best birthrights, that of being free from all taxes, but such as they have consented to in person or by their representatives, and of trial by their peers."

1 Samuel Adams' Writings (Cushing's ed.), Instructions of the Town of Boston to its representatives in the General Court, September, 1765 (pp. 8-9):

"But we are more particularly alarmed and astonished at the act, called the stamp act, by which a very grievous and we apprehend unconstitutional tax is to be laid upon the Colony.

"By the Royal Charter granted to our ancestors, the power of making laws for our internal government, and of levying taxes, is vested in the General Assembly: And by the same charter the inhabitants of this province are entitled to all the rights and privileges of natural free born subjects of Great Britain: The most essential rights of British subjects are those of being represented in the same body which exercises the power of levying taxes upon them, and of having their property tried by juries: These are the very pillars of the British Constitution founded in the common rights of mankind."

1 Samuel Adams' Writings (Cushings' ed.), Answer of the House of Rep-

representatives of Massachusetts to the Governor's Speech, October 23, 1765 (pp. 16-7):

"You are pleased to say, that the stamp act is an act of parliament, and as such ought to be observed. * * * We hope we may without offence, put your Excellency in mind if that most grievous sentence of excommunication, solemnly denounced by the church, in the name of the Sacred Trinity, in the presence of King Henry the Third, and the estates of the realm, against all those who should make statutes, or observe them, being made contrary to the liberties of the Magna Charta. We are ready to think that those zealous advocates for the constitution usually compared their acts of Parliament with Magna Charta; and if it ever happened that such acts were made as infringed upon the rights of that charter, they were always repealed. We * * * cannot but be surprised at an intimation in your speech, that they will require a submission to an act as a preliminary to their granting relief from the unconstitutional burdens of it * * *.

"The Parliament has a right to make all laws within the limits of their own constitution; they claim no more. Your Excellency will acknowledge that there are certain original inherent rights belonging to the people, which the Parliament itself cannot divest them of, consistent with their own constitution: among these is the right of representation in the same body which exercises the power of taxation. There is a necessity that the subjects of America should exercise this power within themselves, otherwise they can have no share in that most essential right, for they are not represented in Parliament, and indeed we think it impracticable."

And further (p. 18):

"The right of the colonies to make their own laws and tax themselves has never been, that we know of, questioned; but has been constantly recognized by the King and Parliament. The very supposition that the Parliament, through the supreme power over the subjects of Britain universally, should yet conceive of a despotic power within themselves, would be most disrespectful * * *."

And further (pp. 19-20):

"They complain that some of the most essential rights of Magna Charta, to which as British subjects they have an undoubted claim, are injured by it: * * * that it may be made use of as a precedent for their fellow subjects in Britain for the future, to demand of them what part of their estates they shall think proper, and the whole if they please: that it invests a single judge of the admiralty, with a power to try and determine their property in controversies arising from internal concerns, without a jury, contrary to the very expression of Magna Charta; that no freeman shall be amerced, but by the oath of good and lawful men of the vicinage: that it even puts it in the power of an informer to carry a supposed offender more than two thousand miles for trial; and what is the worst of all evils, if his Majesty's American subjects are not to be governed,

according to the known stated rules of the constitution, as those in Britain are, it is greatly to be feared that their minds may in time become disaffected."

1 Samuel Adams' Writings (Cushing's ed.), Resolutions of the House of Representatives of Massachusetts, October 29, 1765 (pp. 23-6):

"Whereas the just rights of his Majesty's subjects of this Province, derived to them from the British Constitution, as well as the royal charter, have been lately drawn into question: in order to ascertain the same, this House do unanimously come into the following resolves:

1. Resolved, That there are certain essential rights of the British Constitution of Government, which are founded in the law of God and nature, and are the common rights of mankind; therefore,

2. Resolved, That the inhabitants of this Province are unalienably entitled to those essential rights in common with all men: and that no law of society can, consistent with the law of God and nature, divest them of those rights.

3. Resolved, That no man can justly take the property of another without his consent; and that upon this original principle, the right of representation in the same body which exercises the power of making laws for levying taxes, which is one of the main pillars of the British Constitution, is evidently founded.

4. Resolved, That this inherent right, together with all other essential rights, liberties, privileges and immunities of the people of Great Britain, have been fully confirmed to them by Magna Charta, and by former and by later acts of Parliament.

5. Resolved, That his Majesty's subjects in America are, in reason and common sense, entitled to the same extent of liberty with his Majesty's subjects in Britain. * * *

11. Resolved, That the only method whereby the constitutional rights of the subjects of this Province can be secure, consistent with a subordination to the Supreme power of Great Britain, is by the continued exercise of such powers of government as are granted in the royal charter, and a firm adherence to the privileges of the same.

12. Resolved, as a just conclusion from some of the foregoing resolves, That all acts made by any power whatever, other than the General Assembly of this Province, imposing taxes on the inhabitants, are infringements of our inherent and unalienable rights as men and British subjects, and render void the most valuable declarations of our charter."

1 Samuel Adams' Writings (Cushing's ed.), House of Representatives of Massachusetts to the speakers of other Houses of Representatives, February 11, 1768 (pp. 185-6):

"That in all free states the constitution is fixed; and as the supreme legislative derives its power and authority from the constitution, it cannot overleap the bounds of it without destroying its own foundation, * * * That it is an essential unalterable right in nature, ingrafted into the British Constitution,

as a fundamental law and ever held sacred and irrevocable by the subjects within the realm, that what a man has honestly acquired is absolutely his own, which he may freely give, but cannot be taken from him without his consent:
* * *

"It is moreover their humble opinion, which they express with the greatest deference to the wisdom of the Parliament that the acts made there imposing duties on the people of this province with the sole and express purpose of raising a revenue, are infringements of their natural and constitutional rights because as they are not represented in the British Parliament his Majesty's Commons in Britain by those acts grant their property without their consent."

² Samuel Adams' Works, Report adopted by Town of Boston, November 20, 1772 (pp. 356-7):

"The absolute rights of Englishmen, and all freemen in or out of civil society, are principally, personal security, personal liberty and private property.
* * *

"The legislative has no right to absolute arbitrary power over the lives and fortunes of the people: Nor can mortals assume a prerogative, not only too high for men, but for Angels; and therefore reserved for the exercise of the Deity alone— * * *

"The Supreme power cannot justly take from any man, any part of his property without his consent, in person or by his representative."

See, also: 1 Samuel Adams' Writings, 64-5, Letter to Dennys DeBerdt, December 20, 1765.

1 Samuel Adams' Writings, 90-2, Letter of Town of Boston to Dennys DeBerdt, October 22, 1766.

1 Samuel Adams' Writings, 135-6, 139, 147, Letter House of Representatives to Dennys DeBerdt, January 12, 1768.

1 Samuel Adams' Writings, 156-7, Letter House of Representatives to Earl of Shelburne, January 15, 1768.

1 Samuel Adams' Writings, 171, Letter House of Representatives to Marquis of Rockingham, January 22, 1768.

1 Samuel Adams' Writings, 174, Letter House of Representatives to Lord Camden, January 29, 1768.

1 Samuel Adams' Writings, 180, Letter House of Representatives to Earl of Chatham, February 2, 1768.

1 Samuel Adams' Writings, 190, Letter House of Representatives to Conway, February 13, 1768.

1 Samuel Adams' Writings, 196, Letter House to Representatives to Lords Commissioners of the Treasury, February 17, 1768.

1 Samuel Adams' Writings, 241-4. The Convention of Mass. Towns to Dennys DeBerdt, October 10, 1768.

3 Samuel Adams' Writings, 68, Resolutions Town of Boston, November 5, 1773.

3 Samuel Adams' Writings, 90, Letter Committee of Correspondence of Mass. to Benjamin Franklin, March 31, 1714.

1 Samuel Adams' Writings (Cushing's ed.), Letter of November 11, 1765 (p. 28):

"So that this charter" (of Massachusetts) "is to be looked upon, to be as sacred to them as Magna Charta is to the people of Britain; as it contains a declaration of all their rights founded in natural justice.

"By this charter we have an exclusive right to make laws for our own internal government and taxation."

And further (p. 27):

"In this charter, * * * there was a greater sacredness, than in those of the corporations in England: because those were only acts of grace, whereas this was a contract, between the King and the first patentees; They promised the King to enlarge his dominion, on their own charge, provided that they and their posterity might enjoy such and such privileges. * * * Thus we see that whatever government in general may be founded in, ours was manifestly founded in compact."

And further (p. 30):

"The Stamp Act * * * is looked upon as an infringement of the rights of Magna Charta, to which the colonists as free subjects have an undoubted claim."

1 Samuel Adams' Writings (Cushing's ed.), Letter to John Smith, December 20, 1765 (p. 55):

"No man in the State of nature can justly take another's property without his consent. It is an essential part of the British Constitution that the Supreme power cannot take from any man any part of his property without his consent in person or by his representative."

1 Samuel Adams' Writings (Cushing's ed.), Letter to Dennys DeBerdt, December 20, 1765 (p. 64):

"They hold themselves entitled to all the inherent, unalienable rights of nature, as men—and to all the essential rights of Britons, as subjects. The common law of England, and the grand leading principles of the British Constitution have their foundation in the laws of nature and universal reason. Hence one would think that British rights are in a great measure, unalienable, the rights of the colonists, and of all men else."

And further (p. 65):

"The primary, absolute, natural rights of Englishmen as frequently declared in acts of Parliament from Magna Charta to this day, are personal security, personal liberty and private property, and to these rights the colonists are entitled by charters, by common law and by acts of Parliament. Can it

then be wondered at that the act for levying stamp duties upon the colonies should be astonishing to them, since in divers respects it totally annihilates these rights. It is a fundamental principle of the British Constitution that the Supreme power cannot take from any man any part of his property without his consent in person or by representation."

In connection with these citations attention should also be called to

Loan Association v. Topeka, 20 Wallace, 655, in which the Supreme Court of the United States held that a statute authorizing a municipality to issue bonds in aid of the manufacturing enterprise of individuals was void, because the taxes necessary to pay the bonds, would, if collected, be a transfer of the property of individuals to aid in the project of gain and profit to others and not for a public use. The court says (p. 663): "The theory of our governments, State and National, is opposed to the deposit of unlimited power anywhere." Mr. Justice Clifford dissented upon the ground that the legislative authority was absolute except so far as it was restricted by written constitutions.

IV. To-day the Privy Council annuls as *ultra vires*, Dominion, Commonwealth, Union and Colonial Laws in excess of or in contravention of the act constituting the dominion or commonwealth, quite as readily as would our Federal Supreme Court in cases where the federal constitution has been contravened.

Privy Council decisions before the American Revolution holding colonial laws *ultra vires* or passing on what we would to-day call constitutional questions.

Between 1680 and 1780, 265 appeals from the thirteen colonies reached the Privy Council. A number (the imperfect and only partially printed records of the Privy Council fail to show just how many) involved questions of the validity or invalidity of Colonial laws. Besides this, the Privy Council acted as a council of revision in advising the crown whether to approve or veto colonial laws (Colonial Appeals to the Privy Council, Schlesinger, 28 Political Science Quarterly, pp. 279-297, 433-50).

1727-8. In *Winthrop v. Lechmere*, 1 Thayer's Cases on Constitutional Law (Privy Council), 34, 27-9, an act of the colony of Connecticut providing for the equal distribution of all of an intestate's estate among his children except that the eldest son was to receive a double portion, was annulled because it was in violation of the English law of primogeniture and as unwarranted by the charter of the colony.

The Privy Council says (pp. 37-8):

"Their Lordships having heard all parties concerned by their counsel * * *, and there being laid before their Lordships an Act passed by the Governor and Company of that colony * * *, by which act (amongst other things) administrators of persons dying intestate are directed to inventory all the estate whatsoever of the person so deceased, as well movable as not movable, * * * the said Court of Probates is empowered to distribute all the remaining estate of any such intestate, as well real as personal, by equal portions to

and amongst the children and such as legally represent them, except the eldest son who is to have two shares or a double portion of the whole. * * *

Their Lordships, upon due consideration of the whole matter, do agree humbly to report as their opinion to your Majesty, that the said Act for the Settlement of Intestate's Estates should be declared null and void, being contrary to the laws of England, in regard it makes land of inheritance distributable as personal estates, and is not warranted by the charter of that colony. * * *

In *Penn. v. Lord Baltimore, 1 Vesey, Sr., 444*, the Court of Chancery settled a part of the boundaries of the colonies of Maryland and Pennsylvania.

Lord Chancellor Hardwicke said (p. 446):

"I directed this cause to stand over for judgment, not so much from any doubt of what was the justice of the case, as by reason of the nature of it, the great consequence and importance, and the great labor and ability of the argument on both sides; it being for the determination of the right and boundaries of two great provincial governments and three counties; of a nature worthy the judicature of a Roman senate rather than of a single judge: and my consolation is, that if I should err in my judgment, there is a judicature equal in dignity to a Roman Senate that will correct it."

1760. In 5 Pennsylvania Statutes at Large, 735-7, the validity of 19 Pennsylvania acts as to whether or not "there be clauses and provisions in any of the said acts which are not consonant to reason or which are repugnant or contrary to the laws, statutes or rights of England or inconsistent with the King's sovereignty or lawful prerogative or contrary to the allegiance due from the proprietaries or the inhabitants of the said province or not warranted by the power given by the charter to make laws," was submitted to Attorney General Pratt (afterwards Lord Camden) and Solicitor General Yorke. The Attorney General and Solicitor General advised the Privy Council (p. 736):

"There may be cases in which particular provisions may be void *ab initio* though other parts of the law may be valid, as in the clauses where any act of Parliament may be contraversed or any legal right of a private subject bound without his consent. These are cases the decision of which does not depend on the exercise of a discretionary prerogative, but may arise judicially and must be determined by general rules of law and the Constitution of England. And upon this ground it is, that in some instances whole acts of assembly have been declared void in the courts of Westminster Hall, and by His Majesty in council upon appeals from the plantations."

Privy Council decisions after the American Revolution, holding Dominion, Commonwealth and Colonial laws *ultra vires*:

1878. In *Queen v. Burah*, 3 Appeal Cases, 889, 905, the Privy Council held that the High Court at Bengal has power to question the validity of the legislative acts of the Governor General of India in Council, but that the legislative act in question was *intra vires* (reversing on the latter point, *Empress v. Burah*, 3 Indian Law Reports, Calcutta Series, 64).

1881. In *Dobie v. The Temporalities Board*, 7 Appeal Cases, 136, 149, the Privy Council held that where a Dominion Act created a corporation, an act of the province of Quebec assuming to repeal and amend it was "invalid."

1895. In *Brophy v. Attorney General of Manitoba*, Appeal Cases (1895), 202, 217, 226-8, the Privy Council held that so much of the Manitoba Education Act as withdrew provincial aid from Roman Catholic denominational schools, while Catholics remained liable for school taxes in support of non-sectarian schools, was *ultra vires*.

1896. In *Attorney General for Ontario v. Attorney General for the Dominion*, Appeal Cases (1896), 348, 366-7, 371, the Privy Council held that the Canada Temperance Act so far as it purported to repeal the prohibitory clauses of the Ontario temperance law "was *ultra vires*."

1898. In *Attorney General for the Dominion of Canada v. Attorney Generals for the Provinces of Ontario, Quebec and Nova Scotia*, Appeal Cases (1898), 701, 714, the Privy Council held that the Revised Statutes of Canada so far as they empower the grant of exclusive fishing rights over provincial property, are *ultra vires*.

1899. In *Union Colliery Co. of British Columbia v. Bryden*, Appeal Cases (1899), 580, 587-8, the Privy Council held that a British Columbia Act prohibiting Chinamen of full age from employment in underground coal mines "*ultra vires*," as within the exclusive authority of the Dominion Parliament in regard to "naturalization and aliens."

1903. In *Attorney General for Ontario v. Hamilton Street Railway Co.*, Appeal Cases (1903), 524, 528-9, the Privy Council held that an Ontario provincial "act to prevent the Profanation of the Lord's Day" *ultra vires*, because within the exclusive authority of the Dominion Parliament.

1905. In *Toronto Corporation v. Bell Telephone Co.*, Appeal Cases (1905), 52, 58-9, the Privy Council held that an Ontario act requiring a telephone company incorporated under a dominion act, to exercise its charter powers subject to the consent of the municipal council of Toronto, was *ultra vires*.

1908. In *Woodruff v. Attorney General for Ontario*, Appeal Cases (1908), 508, 513, the Privy Council held it was *ultra vires* for the Legislature of Ontario to tax property not within the province.

1911. In *Burrard Power Company v. Rex*, Appeal Cases (1911), 87, 94-5, the Privy Council held that a British Columbian Act authorizing its water commissioners to grant water rights belonging to the Dominion, was *ultra vires*.

1912. In *City of Montreal v. Montreal Street Railway*, Appeal Cases (1912), 333, 346, the Privy Council held that the Dominion of Canada Railway Act subjecting provincial or intrastate railways to its provisions relating to through traffic, was "*ultra vires* of the Dominion Parliament."

1912. In *Re Marriage Legislation in Canada*, Appeal Cases (1912), 880, 886-7, the Privy Council held that the Dominion had no power to set aside the restrictions imposed by the Province of Quebec upon the solemnization of

marriages between persons of different religions, and that a uniform marriage law for the Dominion, "notwithstanding any differences in the religious faith of the persons so married and without regard to the religion of the person performing the ceremony," was *ultra vires*.

1913. In *Royal Bank of Canada v. Rex*, Appeal Cases (1913), 283, 289-98, the Privy Council held an Alberta Provincial Act directing the proceeds of the sale of the bonds of an insolvent railroad, which bonds the Province had guaranteed, to be paid over to the Treasurer of the Province to form part of the general revenue fund of the Province free and clear of any claim by the railway company, their successors or assigns, *ultra vires* as abrogating civil rights existing and enforceable outside the Province.

The House of Lords refuses to execute colonial laws in contravention of Imperial law.

1868. In *Routledge v. Low*, L. R., 3 House of Lords, 100, 108-120 (aff'g *Low v. Routledge*, 1 Chancery Appeal Cases, 42, 45-7), it was held that an alien who during his temporary residence in Canada, publishes in the United Kingdom, a book of which he is the author, is entitled to the benefit of English copyright throughout the Empire, notwithstanding an inconsistent Canadian law.

In 1865, Parliament passed the Colonial Laws Validity Act to prevent Colonial Laws being annulled by the courts, because in contravention of the common law not applicable to the colony or in contravention of some merely local British statute not intended to apply to the colony. Since 1865, Colonial laws have been annulled when in contravention of an act of Parliament clearly applying to the colony or in contravention of the prerogative of the crown. *Webb v. Outrim*, Appeal Cases (1907), 88.

For the authorities under the Colonial Laws Validity Act, see *Annotated Constitution of the Australian Commonwealth*, Quick & Garran, pp. 347-352.

Australian decisions holding Commonwealth and State Laws *ultra vires*:

1904. In *D'Emden v. Pedder*, 1 Commonwealth Law Reports (Australia) 91, a stamp tax law of the State of Tasmania was held *ultra vires* or unconstitutional as applying to the receipt given by a federal officer in Tasmania upon his salary from the Commonwealth.

The High Court of Australia followed the decisions of our federal court of last resort holding that a tax upon the salary of a federal officer or upon an instrument of the federal government was invalid.

During the argument Justice Barton spoke of the question as one of "constitutional" (p. 97) law; and Chief Justice Griffith treated the question as one of "the constitutionality of a statute" (p. 98).

The opinion of the court decided the case as involving "constitutional questions," of "the validity of an attempted exercise of legislative power" and as an "invalid law" (pp. 106-7, 111, 117).

1905. In *Young v. Tockassie*, 2 Commonwealth Law Reports, 470, 475-8,

the High Court of Australia held that a regulation made by the Governor in Council of the colony of Queensland in contravention of the authority conferred upon him by a colonial act providing that "No deduction from the wages of a time expired Islander, on account of time lost through sickness, shall be permitted, where such sickness is the result of an accident which has occurred while the Islander was at work," was "*ultra vires*" (p. 478).

1907. In *Webb V. Outrim*, Appeal Cases (1907), 81, the Privy Council disapproved *D'Emden v. Pedder*, because it asserted in substance that no British Court could declare an act "unconstitutional," although it held that Colonial Acts were and should be declared "inoperative" insofar as they were "repugnant to the provisions of any act of Parliament extending to the colony" (p. 88).

1907. In *Barter v. Commissioners of Taxation*, 4 Commonwealth Law Reports, part II, 1087, the High Court of Australia refused to follow the Privy Council decision in *Webb v. Outrim*, and held that the income tax law of the State of New South Wales was invalid or "*ultra vires*" as to the salary of a federal officer. (See opinion of Griffith, Chief Justice, 1110-9; 1125-1133.)

1908. The Privy Council refused to allow an appeal. *Commissioners of Taxation v. Barter*, Appeal Cases (1908), 214.

1908. In *King v. Barger*, 6 Commonwealth L. R., 42, 63-5, 74-80, the High Court of Australia held that a commonwealth excise tariff imposing an excise tax upon all goods not manufactured under labor conditions which had been approved by the Commonwealth Parliament or by the Court of Conciliation and Arbitration, was *ultra vires* as within the sole authority of the States, and also as authorizing discriminations between States or parts of States.

1908. In *Attorney General for N. S. W. v. Brewery Employees Union*, 6 Commonwealth L. R., 470, the High Court of Australia held that a commonwealth trade marks act which attempted to regulate the internal trade of the States, was *ultra vires*.

1909. In *Fox v. Robbins*, 8 Commonwealth L. R., 116, 120-32, the High Court of Australia held that a Western Australian State law imposing a higher license fee (£50) for the sale of wines manufactured in any other State, in favor of Western Australian wine (£2 only), was *ultra vires*.

1909. In *Huddart, Parker & Co. Proprietary Ltd. v. Moorehead*, 8 Commonwealth Law Reports, 331, 346-54, 361, 365, 370, 408-10, 414, the High Court of Australia held sections 5 and 8 of the Commonwealth Industries Preservation Act of 1906, prohibiting corporations from making or entering into contracts in restraint of internal or intrastate trade or commerce within the Commonwealth, *ultra vires*, because it was within the power to regulate domestic or intrastate trade, a matter which is reserved to the States, and because the Commonwealth is not empowered to regulate or control the contracts of or the internal or domestic business carried on by corporations that are lawfully exercising their corporate functions by carrying on business within the States.

The High Court of Australia has also held "*ultra vires*."

(1) A *Commonwealth* law affecting State Railways.

1906. Federated Amalgamated Government Railway and Tramway Service Assn. v. New South Wales Railway Traffic Employees Assn., 4 Commonwealth Law Reports, 489, 539, 545-7.

(2) An award of a Commonwealth Court of Conciliation and Arbitration contrary to the prior award of a State wages board made pursuant to a State law.

1910. Australian Boot Trade Employees Federation v. Whybrow, 10 Commonwealth Law Reports, 267, 278-80, 283, 295-6, 305-9.

(3) A Commonwealth Act dealing with the regulation of industries generally.

1910. Rex v. Commonwealth Court of Conciliation and Arbitration, 11 Commonwealth Law Reports, 2, 25-6, 34-5.

1910. Australian Boot Trade Employees Federation v. Whybrow, 11 Commonwealth Law Reports, 311, 316-8, 319-20, 329, 335, 340, 343, 345.

Moore Constitution of the (Australian) Commonwealth, 2d. ed., says (p. 357):

"The most distinctive feature of the Courts in the Federal system is their power to determine whether a statute passed by the Commonwealth or by a State Parliament is within the authority committed to that Legislature, a power which gives the Courts a peculiar importance in constitutional law and makes them in an especial way the 'guardians of the Constitution.'"

* * * * *

Thus, in Germany and Switzerland, where the law of State or canton conflicts with federal laws or the federal Constitution, the Courts must treat the State Law as *pro tanto* overridden."

And further (p. 360):

"In the early history of the Australian colonies, the Legislature and the Supreme Court were brought into curiously close relation by the part which was assigned to the Chief Justice in the Legislative Council of the Governor of New South Wales * * * ; and by the compulsory submission of all Acts of the Legislative Councils to the Supreme Court for the consideration of their validity under 9 Geo. IV., c. 83, sec. 22. * * * The members of the convention were, however, thoroughly acquainted with the prevalence and the nature of judicial control as developed in the United States, a control experienced in some small degree by the colonies themselves, notably in the early days of responsible government in South Australia. The tendency was in fact rather to exaggerate than to underrate the controlling power of the Courts. In general, the power was regarded with singularly little jealousy or suspicion, a phenomenon entirely in accord with the tendency of the day to submit to judicial authority problems which are more economical or political than legal."

And further (p. 361):

"The duty of passing upon the validity of Acts whether of the Commonwealth or of the State Parliament exists purely as an incident of judicial power. It belongs not to any one court, or any system of courts, but to all courts within the Commonwealth, whatever their degree, whenever in a matter in litigation before them, some act of the one legislature or of the other is invoked."

The debates and correspondence in the Australian Federal Conventions show that the practice of the Colonial Courts declaring laws *ultra vires* had prevailed throughout Australasia, and was fully approved by the delegates to the different sessions of the Federal Conventions.

Proceedings and Debates of National Australasian Convention, Sydney, 1891; Letter of Mr. Justice Richmond, p. cxii; Answer of Chairman Judiciary Committee, p. cxcv; Debates, pp. 229-30, 417.

Official Report of the National Australasian Convention Debates, Adelaide, 1897, 944-5, 950-3, 962-6, 968, 971-4, 977-8, 989.

Melbourne, 1898, Vol. 1, pp. 272, 277-9, 283-4, 286-92, 297-301, 303, 306-7, 310, 338-9; Vol. 2, pp. 1717-21, 1723-32.

Annotated Constitution of the Australian Commonwealth, Quick & Garran (Debates in the British Parliament), pp. 242-9, 252.

The Australian view appears to justify the American Revolution on the same grounds upon which Pitt justified it, viz.: that the Stamp Act and the Tea Tax were unconstitutional, because there could be no taxation without representation.

The Annotated Constitution of the Australian Commonwealth, Quick & Garran, pp. 21-2.

In the Australasian Federal Convention of 1898, the resolution of Mr. Holder of South Australia that in the event of any Commonwealth law being declared *ultra vires* by the High Court, the Executive may upon a majority vote of each house of the legislature, refer the law to a plebiscite of the electors, and if approved by them the Constitution shall be deemed to have been enlarged, and the law shall be deemed to have been *intra vires* of the Constitution from the passing thereof, was withdrawn by its proposer after a debate in which it appeared that he had no supporters in the Australasian Constitutional Convention.

2 Official Record of the Debates of the Australasian Federal Convention (Melbourne, 1898), 1717-1721, 1723-1732.

Moore Constitution of the Commonwealth, 2d ed., 360-1.

On April 26, 1911, a proposal to amend the Constitution of Australia by conferring upon the Commonwealth Parliament plenary power to make laws with respect to labor and employment including the wages and conditions of

labor and employment in any trade, industry or calling (Commonwealth Acts, Australia, Vol. 9, 1910, pp. 117-8) was disapproved on a referendum vote by the electors (Commonwealth Acts, 1901-1911, Indexes, Vol. 2, p. 951; 23 American Legal News, 71-3).

New Zealand decisions holding colonial laws or ordinances *ultra vires*:

1867. In *Sinclair v. Bagge*, 1 New Zealand Court of Appeal, 50, 53, 65-8, it was held that a colonial act purporting to set up a new tribunal of civil judicature inconsistently with the Constitution Act and the Provincial Councils Powers Act, was *ultra vires*.

1870. In *McManaway v. Cleland*, 1 New Zealand Court of Appeal, 343, 372, it was held that an ordinance validating Crown Grants against Her Majesty, "and against all other persons whatsoever," was *ultra vires*.

1879. In *Re Gleich*, 1 Olliver, Bell & Fitzgerald (Supreme Court), 39, 41-6, it was held that a colonial act authorizing the deportation of persons charged with indictable misdemeanors in other Australian colonies, was *ultra vires*.

1892. In *Buckley v. Edwards*, Appeal Cases, 1892, 387, 390-401, the Privy Council held that the appointment by the Governor and Council of New Zealand of a commissioner under the native land court acts as a Supreme Court Judge, which appointment had been sustained by the Supreme Court of New Zealand, was *ultra vires*, because not made with express legislative sanction for the creation of an additional judge.

1895. In *Clemison v. Mayor of West Harbour*, 13 New Zealand Law Rep. 695, 702-3, it was held that an order in council purporting to reopen the road line of a closed and discontinued highway, was *ultra vires* as to the abutting owners of land affected thereby.

To same effect:

1867. *Robinson v. Reynolds*, Macassey, New Zealand Rep., 562, 574.

1872. *Regina v. Fish*, Macassey, New Zealand Rep., 1092, 1095.

South African decisions holding laws or legislative ordinances *ultra vires*:

1828. In *Re Brink*, 1 Menzie, Cape of Good Hope Reports, 340, 343, it was held that the non-promulgation of a legislative act of the Governor, deprived it of any force, effect or validity as a law.

1847. In *Municipality of Cape Town b. Morkel*, 3 Menzie, 561, 563, it was held that the Supreme Court of the Colony was the only colonial court which could try and determine the validity or invalidity of legislative ordinances passed by the Governor, with the advice and consent of the legislative council.

1853. In *Fielden v. Anstie*, 2 Searle, Cape of Good Hope, 15, 22-3, 31-5, an ordinance of the Colony of Natal, confirming an inoperative Cape of Good Hope ordinance allowing appeals from the District Court of Natal to the Supreme Court of the Colony of the Cape of Good Hope, was held of no force and effect.

1864. In *Deane v. Field*, 1 Roscoe, Cape of Good Hope, 165, 167, it was

held that a resolution of the Colonial Assembly and an order from the Governor requiring importers to file a bond to pay such increased duties upon bonded goods as might thereafter be enacted by the Cape Parliament at the current session, did not justify a collector of customs in refusing to deliver goods where no bonds to pay possible increased duties were filed, nor absolve him from damages in case of a refusal to deliver such goods.

1895. In *Brown v. Leyds*, 4 Official Reports, High Court, South African Republic, 17, 23-36, 41-3, 47-54 (14 Cape Law Journal, 71-2, 97-106), it was held that a resolution of the second Volksraad only, suspending the proclamation of a public digging and invalidating all claims pegged thereunder, was unconstitutional because in conflict with the Grondwet.

1897. In *Sprigg v. Sigcau*, Appeal Cases (1897), 238, 246-8, it was held that a legislative proclamation of the Governor of Cape Colony, setting aside the existing criminal law in the annexed district of Pondoland and directing the arrest and imprisonment of a native chief untried and unheard at the governor's pleasure, was *ultra vires*.

1902. In *Crow v. Aronson*, Transvaal L. R. (1902), 247-8, 255-61, 265-9, 276, it was held that a proclamation of the Executive Council of the South African Republic exempting mortgagers from the payment of interest on bonds and relieving certain lessees from the payment of rent during the existence of martial law, was *ultra vires*.

1907. In *Municipality of Worcester v. Colonial Government*, 24 S. C., Cape of Good Hope, 67, 69, it was held that a resolution of the Cape Parliament authorizing a land grant to an agricultural society for public purposes, could not authorize the divesting of the prior pasturage right of the inhabitants of the municipality.

1908. In *Howard v. Receiver of Revenue*, Transvaal L. R. (1908), High Court, 41, 44-5, a regulation requiring a magistrate's certificate as to the good character of a person applying for a license to trade in unwrought precious metals, was held *ultra vires*.

1909. In *Howard v. Attorney General*, Transvaal L. R. (1909), High Court, 164, 167-9, a regulation forfeiting precious metals in the possession of any licensed dealer in unwrought precious metal, who fails to dispose of them within three months after the termination of his license, was held *ultra vires* because confiscatory.

The power to refuse to execute statutes in contravention of the fundamental law has been freely exercised in Argentina.

Roscoe Pound, The Judicial Office in the United States, Address before the Worcester County (Mass.) Bar Association, March 10, 1914, pp. 17, 20.

1911. Case of *Dona Elisa Alicia Lynch*, 115 Fallos de la Suprema Corte (Argentina), 189-90, 193-8, 203-4, 211-2.

1911. Case of *Dona Rosa Melo de Cane*, 115 Fallos de la Suprema Corte, 112, 135-7.

1908. *Compania General de Ferro Carriles v. de Silva*, 108 Fallos de la Suprema Corte, 240, 253-5, 258-63.

1907. *Hermanos v. Buenos Aires*, 107 Fallos de la Suprema Corte, 385, 387-8.

1907. *Ostendorp v. Cordoba*, 106 Fallos de la Suprema Corte, 109, 111. It has also been exercised in Roumania in 1912, first in the second chamber of the Tribunal of Ilfov, later by the Roumania Court of Cassation.

6 American Political Science Review, 456; 29 Revue du Droit Public, 138-56, 365-8, 479.

The first Russian (Finnish decision) refusing enforcements of a Russian law is reported in the New York Times of Monday, May 25, 1914, as follows:

"OVATION TO PATRIOT JUDGES

Finns Cheer Them as They Return from a Russian Prison

Helsingfors, Finland, May 24.—After serving eight months' imprisonment for refusing to enforce a law conferring equal rights upon Russians with Finns in Finland, which passed the Duma, but not the Finnish Senate, the entire High Court of Viborg, consisting of sixteen Judges, returned here to-day.

An immense crowd assembled to welcome the Judges and cheered enthusiastically. Mounted gendarmes, riding on the sidewalks, used their whips on the people for 'unlawful cheering.'

The judges were confined in the Kresty Prison at St. Petersburg."

The Annual Bulletin of the Comparative Law Bureau of the American Bar Association for 1914 gives the following examples of judicial review in other nations.

The Home Rule Bill imposes the following constitutional limitations upon the Irish Parliament to be enforced by the Privy Council:

"1. It cannot legislate on peace or war, navy or army force, foreign relations, trade outside of Ireland, coinage or legal tender.

2. It cannot make any law, either directly or indirectly, to establish or endow any religion or prohibit the free exercise thereof or give a preference, privilege or advantage or impose any disability or disadvantage on account of religious belief or religious or ecclesiastical status, or make any religious belief or religious ceremony a condition of the validity of any marriage.

3. It is restricted as to legislation on land purchase, old age pensions, national insurance, labor exchanges, royal Irish Constabulary, post-office and other banks and friendly societies.

Forty-two members are still to be sent from Ireland to the House of Commons.

The Judicial Committee of the Privy Council is to give final decision as to the constitutional validity of any act of the Irish Parliament." (Annual Bulletin, Comparative Law Bureau of American Bar Association, July 1, 1914, p. 69.)

Bolivia:

"The Supreme Court has cognizance of appeals and has original jurisdiction of matters involving the constitutionality of laws, decrees and resolutions." (Annual Bulletin, 1914, p. 88.)

Colombia:

"The Supreme Court sits at the capital, Bogota, is composed of nine Magistrates, elected for terms of five years, the presiding justice being elected annually by the Court itself. It is a Court of Error and Appeal, has original jurisdiction in maritime matters, in cases affecting constitutional rights, * * * and to it is confided the care of the integrity of the Constitution. Laws passed by Congress, objected to by the President as unconstitutional or brought directly to its attention by any citizen, are passed upon immediately." (Annual Bulletin, 1914, p. 98.)

"The most notable and progressive development is the increasing importance of the Supreme Court as the guardian of the integrity of the Constitution and of private constitutional rights, even against the Government. The power to pass on the constitutionality of laws was given to it expressly by the amendments adopted in 1910. Especially notable decisions were those of August 2, 1912, and August 22, 1913, holding certain laws or parts of laws invalid, which attempted, by imposing prohibitive taxes upon the exploitation of privately owned emerald mines and restriction upon sales of emeralds, to create practically a government monopoly. These were held in so far as mines acquired prior to 1905 and tax paid in perpetuity are concerned, to be an unconstitutional infringement of vested property rights." (Annual Bulletin, 1914, p. 101.)

Cuba:

"The Supreme Court is a court of appeal, decides as to conflict of jurisdiction of inferior courts, takes cognizance of litigation in which the nation, provinces or municipalities are parties *inter se*, decides as to the constitutionality of laws, decrees and regulations when the subject of controversy between litigants." (Annual Bulletin, 1914, p. 104.)

Mexico:

"By Article 101, the tribunals of the Federation shall determine all controversies which may arise: 1, on account of laws or acts of any authority which violates individual guaranties; 2, on account of laws or acts of the federal authority which may invade or restrict the sovereignty of the States; 3, on account of the laws or acts of the State authorities which may invade the sphere of federal authorities. (This Article is the basis of the famous Mexican Recurso de Amparo, which combines the features of the writ of habeas corpus, the writ of error, and the writ of certiorari. Its special operation is to allow recourse in all cases and by all persons to the Federal Courts for relief and redress against any act of any authority, judicial or administrative, which is deemed by the appellant to be a violation of individual guaranties or the rights of man.)" (Annual Bulletin, 1914, pp. 121-2.)

Venezuela:

"The Judicial Power consists, for the nation, of a Supreme Federal Court of seven members called the Corte Federal y de Casacion, which has original jurisdiction in impeachment, to decide as to the constitutionality of laws and controversies between States, and in certain cases is a court of cassation." (Annual Bulletin, 1914, p. 148.)

The Constitutions of Argentina and Brazil contain similar provisions in regard to judicial power (or as the Virginia school headed by Jefferson and Madison described it "Judicial annulment") to the system prevailing in the United States. (Annual Bulletin, 1914, pp. 86, 89, 92.)

V. The power of courts to refuse to execute laws because they are in conflict with some law which in the language of the German Imperial Constitution takes precedence over them, has been exercised in some Continental European States ever since the Roman Empire.

In France prior to the Constitution of 1791, the parliaments or judicial high courts in at least two cases declared legislative acts of the French Kings null and void. (Coxe, Judicial Power and Unconstitutional Legislation, 79-80, 82-3.)

In Germany after the adoption of the Imperial Constitution of 1871, an imperial court declared a Royal Saxon ordinance to be inoperative because of an inconsistent imperial law. (Coxe, 91-3.) In 1887 a German imperial court declared inoperative a German State stamp tax law, because of an inconsistent imperial stamp tax law. (Coxe, 94.) The German law prior to the present Empire, from the 15th century to 1871, recognized the right of the then Court of the Imperial Chamber to subordinate inconsistent State laws or regulations to the law of the Empire. (Coxe, 104; 9 Alexander Hamilton's Works; 80 Federalist, p. 496; Attorney General Randolph's argument in *Chisholm v. Georgia*, 2 Dall., 425.)

Under the German Constitution there is a strong federal council like the English Privy Council and like the Council of Revision which was proposed by James Madison in the Federal Constitutional Convention; in some cases the imperial courts enforce the precedence of imperial legislation over State legislation.

Constitution of Germany, Article II. * * *

"The laws of the Empire shall take precedence of those of each individual state."

Article 76. * * *

"In disputes relating to constitutional matters in those states of the Union whose constitution does not designate an authority for the settlement of such differences, the Federal Council shall, at the request of one of the parties, attempt to bring about an adjustment, and if this cannot be done, the matter shall be settled by imperial law."

James' Federal Constitution of Germany (pp. 18, 42-3).

Under the Roman Empire since Justinian, the judges were admonished to

"permit no rescript," that is a special imperial ukase, or private law of the Emperor, made upon the *ex parte* petition of an interested party, "to be alleged before them, which seems to be adverse to general law or to public utility; but that they have no doubt that general imperial constitutions are to be observed in every way." (Coxe, Judicial Power and Unconstitutional Legislation, pp. 108-112.)

During the middle ages while the Canon Law prevailed, two acts of Parliament and part of the Magna Charta of England, as well as many laws of continental European States, were declared null and void as contrary to the Canon Law or to the liberties of the Church. (Coxe on Judicial Power, pp. 122-31, 135-64; Bonham's Case, 8 Coke's Rep., 118a; Prior of Castleacre v. Dean of St. Stephen's, Year Book, 21 Henry VII, 1.)

The Austrian Constitution, the Belgian Constitution, the French Constitution of 1791, and the Italian Constitution all expressly prohibit courts from refusing to execute laws or otherwise enforcing the fundamental law. The Swiss Constitution prohibits the courts from refusing to execute any federal law. (Judge Oscar Hallam, Judicial Power to Declare Legislative Acts Void, 48 American Law Review, 245-7.)

Until the French Revolution, throughout the continent of Europe, publicists and eminent lawyers everywhere believed that the law of nature or law of God, though unwritten, was the supreme law, and that it invalidated all inconsistent human laws.

Haines, American Doctrine of Judicial Supremacy, 18-24,
34-7.

So in France before 1791. Coxe on Judicial Power, 79-83.

So in Germany before 1871. Coxe, 104-5.

So under the Roman Empire. Coxe 108-112.

During the middle ages, Canon Law or ecclesiastical liberties was held superior to the local statute law on the continent.

Coxe, 122-32.

Also in England.

Coxe, 135-164.

In Spain the Justiza, or constitutional guardian of public liberty of Aragon, could and did declare any act of Government unlawful as contrary to the fueros or liberties of Aragon, until the execution of Justiza Lanuza in 1591-2, by order of Phillip II.

1 Prescott, Reign of Charles V. 143-5, 260-5. Robert Ludlow
Fowler, Supreme Judicial Power in Federal Constitution,
29 American Law Review, 723-5.

In England until the American Revolution, Magna Charta was deemed superior to an act of Parliament, or as one of its confirmations put it (McIlwain High Court of Parliament, 59, 65), "and if any statute be made to the contrary, that shall be holden for none." (McIlwain High Court of Parliament, 54-65; 309-10.)

Military necessity arising from the change of public opinion resulting from general conscription and the status of armed camps introduced by the conscription into every large continental European state, is the chief cause of the change of the continental European legal view point from the altruistic one preceding the French Revolution, to the selfish and materialistic one now existing in so many continental countries.

VI. By 1810, when the Federal Supreme Court in *Fletcher v. Peck*, 6 Cranch, 87, held a State law unconstitutional, courts in every State except Georgia, New Hampshire, Tennessee and Vermont appear to have either refused to enforce or else to have held that it would be their duty to refuse to enforce State laws in contravention of or in excess of the State or Federal constitutions.

Connecticut

1785. In *Symsbury case*, Kirby (Conn.), 444, 447, it was held that an act of the General Assembly of Connecticut confirming surveyor Kimberly's line "operated to restrict and limit the western extent of the jurisdiction of the town of Symsbury, but could not legally operate to curtail the land before granted to the proprietors of the town of Symsbury, without their consent; and the grant to Symsbury being prior to the grant made to the towns of Hartford and Windsor, under which the defendant claims, we are of the opinion the title of the lands demanded is in the plaintiffs."

Kentucky

1801. In *Stidger v. Rogers*, 2 Kentucky Decisions, 52, headnote:

"An act of the legislature which authorizes the court to assess the value of property where, prior to the constitution, the assessment could only be made by a jury, is in conflict with the clause of the constitution which provides 'that trial by jury shall be as heretofore, and the right thereof remain inviolate,' and is therefore void.

"An act of the legislature, which authorizes the court to award fifteen per centum damages for the non-performance of a contract, made before the act was passed, changes the obligation of the contract, and is void."

Maryland

1802. In *Whittington v. Polk*, 1 Harris & Johnson (Maryland), 236, 241-6, headnote:

"An act of assembly repugnant to the constitution is void. The court have a right to determine an act of assembly void which is repugnant to the constitution."

Massachusetts

1786. In *Brattle v. Hinckley* and in *Brattle v. Putnam*, 7 Harvard Law Review, 415-7, 419-20; 2 Bancroft's History of the Constitution, 473 (Letter

Cutting to Jefferson), the Supreme Court of Massachusetts declared void statutes providing that in suits brought by absentees during the Revolutionary War to recover debts, judgment for all interest accruing during the war should be suspended until further action of the legislature.

New Jersey

1780. In *State v. Parkhurst*, 9 New Jersey Law, 427, the court say (9 New Jersey Law, 444):

"At an early period of our government, while the minds of men were yet unbiassed by party prejudices, this question was brought forward, in the case of *Holmes and Walton*, arising on what was then called the seizure laws. There it had been enacted that the trial should be by a jury of six men; and it was objected that this was not a constitutional jury; and so it was held; and the act upon solemn argument was adjudged to be unconstitutional, and in that case inoperative. And upon this decision the act, or at least that part of it which relates to the six men jury, was repealed, and a constitutional jury of twelve men substituted in its place. This, then, is not only a judicial decision, but a decision recognized and acquiesced in by the legislative body of the state."

1796:

"In later days, in the case of *Taylor v. Reading*, a certain act of the legislature, passed March, 1795, upon the petition of the defendants, declaring that in certain cases payments made in continental money should be credited as specie, was by this court held to be an *ex post facto law*, and as such unconstitutional, and in that case inoperative.

"And with this decision before them (for the act was made pending the suit), and as I humbly conceive, fully acquiescing therein as to matter of principle, the legislature afterwards, in January, 1797, passed another act for the relief of the said defendant, *Reading*, in another way. These two cases in New Jersey * * * both afterwards brought into notice and acquiesced in, and if I may say so, sanctioned by the legislature, would be sufficient to rule the question."

1804. *State v. Parkhurst*, 9 New Jersey Law, 427, 442-4, headnote:

"The Supreme Court has power to declare an act of the legislature void, as being contrary to the constitution."

New York

1784. In *Rutgers v. Waddington*, 1 Thayer Cases on Constitutional Law, 63, 68-72, the Mayor's Court of the City of New York refused to execute a statute authorizing actions of trespass by the owners of houses against the occupants thereof under orders of the British commander-in-chief.

North Carolina

1787. *Bayard v. Singleton*, 1 Martin (North Carolina), 42, 44-5, it was held that an act of North Carolina passed in 1785, "requiring the court to dis-

miss on motion, the suits brought by persons, whose property had been confiscated, against the purchasers, on affidavit of the defendants that they were purchasers from the commissioners of confiscated property, is unconstitutional and void."

1802. In *Ogden v. Witherspoon*, 2 Haywood (North Carolina), 404-7, syllabus:

"The legislature, by an act passed in 1799, declared that a law passed in 1715 has continued and shall continue in force; it was a question at the time of the passage of the act of 1799, whether the act of 1715 was not repealed by a law passed in 1789; held that the determination of this question belonged to the Judiciary and not to the legislature; and that therefore the act of 1799, so far as it regards this question, contravenes the fourth section of the bill of rights and is void."

1805. In *trustees of the University v. Foy*, 5 North Carolina (1 Murphey), 58, 81, 83-9, it was held that a North Carolina act of 1800 repealing legislative grants made in 1789 and 1794 of all escheated and confiscated property to the University of North Carolina, and reverting the granted property to the State was void, being in violation of the State Bill of Rights.

Ohio

1807-8. In Ohio the Court of Common Pleas for the third circuit, constituting a majority of the State Supreme Court, held a State law of 1805, giving jurisdiction to justices of the peace in cases exceeding \$20, unconstitutional as impairing the constitutional right of trial by jury. One of the judges was thereafter elected governor, and an attempt continued through two legislative sessions to impeach all three of them failed. (1 Chase's Statutes of Ohio, 1833, pp. 38-40; Cooley Constitutional Limitations, 7th ed., 229-30, note.)

Pennsylvania

1793. *Austin v. University of Pennsylvania*, 1 Yeates (Pa.), 260-1, head-note:

"The act of assembly vesting Isaac Austin with a messuage, etc., passed 6th August, 1784, adjudged to be unconstitutional."

1799. In *Respublica v. Duquet*, 2 Yeates (Pa.), 493, 501, the Supreme Court of Pennsylvania asserted the power of the judiciary to declare a law unconstitutional.

1808. In *Emerick v. Harris*, 1 Binney (Pa.), 416, 419-23, 425, the Supreme Court of Pennsylvania again asserted the power of the judiciary to decide upon the constitutionality of State laws.

Rhode Island

1786. In *Trevett v. Weeden*, Cooley Constitutional Limitations, 7th ed., p. 229; 1 Thayer Cases on Constitutional Law, 73-4; 2 Chandler's Criminal

Trials, 269-350, the Superior Court of Rhode Island refused to execute a State law imposing a penalty upon every person who refused to receive State bills in payment for articles offered for sale, or should make distinction in value between State bills and silver and gold.

South Carolina

1789. In *Ham v. M'Claws*, 1 Bay (South Carolina), 93, 98, it was held that a State statute of 1788 forfeiting any negro imported into South Carolina except from another State, and when owned by a citizen of the United States, was null and void.

1805. In *White v. Kendrick*, 1 Brevard (South Carolina), 469, 470-3, headnote:

"The act of assembly of 1801, extending the jurisdiction of justices of the peace to thirty dollars, was adjudged to be unconstitutional."

Tennessee

1807. In *Miller's Lessee v. Holt*, 1 Overton, 242, 244-5, it was held that Tennessee had no right to pass an act perfecting titles within what had been North Carolina.

Virginia

1778. In May, 1778, an act of Virginia attainted one Phillips unless he should render himself to justice within a limited time; after the time expired he was taken and brought before the court to receive sentence of execution pursuant to the attainder. But the court held the attainder invalid and he was put upon his trial according to due process of law. (1 Tucker's Blackstone, ed. 1803, p. 293, appendix; 5 Political Science Quarterly, 235.)

1782. In *Commonwealth v. Caton*, 8 Virginia (4 Call), 5, 8, 16-20, it was held that a resolution of the house of delegates, without the consent of the senate, pardoning three persons condemned for treason, was unconstitutional, inoperative and void.

1788. In case of the judges, 8 Virginia (4 Call), 135, 142-6, 151, it was held that the legislature had no power under the State Constitution to reduce the number of judges of the Court of Appeals, but could remove all the officers of the court.

1792. *Turner v. Turner*, 8 Virginia (4 Call), 234, 237-8, headnote:

"*Ex post facto* laws are contrary to the principles of the constitution."

1793. In *Page v. Pendleton*, Wythe, Virginia Chancery, 211, 213-8, headnote:

"A debt due to a British creditor was not discharged by payment in paper money into the loan office, under the act of 1788, which enacted that such payments should have that effect."

1793. In *Kamper v. Hawkins*, 1 Virginia Cases, 20, 23-8, it was held that a statute requiring judges of the District Courts to exercise also the functions of the Court of Chancery was unconstitutional.

Georgia, New Hampshire, Tennessee and Vermont

Vermont held that a State court had power to declare a State law unconstitutional in 1814 (*Dupy v. Wickwire*, 1 D. Chipman, 237, 238-9); New Hampshire in 1826 (*Woart v. Winnick*, 3 N. H., 473); Tennessee in 1836 (*Union Bank v. State*, 17 Tenn., 490) and Georgia in 1848 (*Flint River Steamboat Co. v. Foster*, 5 Georgia, 194, 204-5).

The principal judicial opponent of Chief Justice Marshall was Chief Justice Gibson of Pennsylvania, who as late as 1825 contended that while it was the duty of the judiciary to refuse to execute any law, State or Federal, that was in violation of the Federal Constitution, it had no right to refuse to execute a State law which was in contravention of the State Constitution. (*Eakin v. Raub*, 12 Sergeant & Rawle, 345-58, Gibson, J.).

In *Norris v. Clymer*, 2 Pa. State, 277, 281 (1845), Chief Justice Gibson concurred with Chief Justice Marshall's views, saying (281):

"I have changed that opinion for two reasons. The late" State Constitutional "Convention, by their silence, sanctioned the pretensions of the courts to deal freely with the acts of the legislature; and from experience of the necessity of the case."

VII. Thomas Jefferson, Samuel Adams and Patrick Henry, the leaders of the radicals and fathers of the bill of rights embodied in the first to the tenth amendments, all believed it was the duty of the judiciary to refuse to execute laws in excess of or in contravention of the constitution, and particularly to enforce the bill of rights.

As Jefferson put it, a constitutional bill of rights was necessary, because of "the legal check which it puts into the hands of the judiciary."

5 Jefferson's Works (Ford ed.), 80-1:

"In the arguments in favor of a declaration of rights, you omit one which has great weight with me, the legal check which it puts into the hands of the judiciary. This is a body, which if rendered independent and kept strictly to their own department merits great confidence for their learning and integrity. In fact what degree of confidence would be too much for a body composed of such men as Wythe, Blair and Pendleton?"

Samuel Adams, in his speech in the Massachusetts convention in support of the constitution, which turned the tide in that convention in favor of its ratification, said (2 Elliot's Debates, 131):

"It removes a doubt which many have entertained respecting the matter, and gives assurance that, if any law made by the federal government shall be extended beyond the power granted by the proposed Constitution, and inconsistent with the constitution, of this state, it will be an error, and adjudged by the courts of law to be void."

Patrick Henry, 3 Elliot's Debates (Virginia Convention), said (pp. 324-5):

"The honorable gentlemen did our judiciary honor in saying that they had firmness to counteract the legislature in some cases. Yes, sir, our judges

opposed the acts of the legislature. We have this landmark to guide us. They had fortitude to declare that they were the judiciary, and would oppose unconstitutional acts. * * * I take it as the highest encomium on this country that the acts of the legislature, if unconstitutional, are liable to be opposed by the judiciary."

Patrick Henry (Virginia Convention), 3 Elliot's Debates, 539-41:

"In what a situation will your judges be, when they are sworn to preserve the Constitution of the State and of the general government! If there be a concurrent dispute between them, which will prevail? They cannot serve two masters struggling for the same object. The laws of Congress being paramount to those of the states, and to their constitutions also, whenever they come in competition, the judges must decide in favor of the former. * * * The judiciary are the sole protection against tyrannical execution of the laws. * * * When Congress, by virtue of this sweeping clause, will organize these courts, they cannot depart from the Constitution; and their laws in opposition to the Constitution would be void. If Congress, under the specious pretence of pursuing this clause, altered it, and prohibited appeals as to fact, the federal judges, if they spoke the sentiments of independent men, would declare their prohibition nugatory and void."

4 Jefferson's Works (Letter to James Madison, Dec. 20, 1787), 476-7:

"Let me add that a bill of rights is what the people are entitled to against every government on earth, general or particular, and what no just government should refuse, or rest on inferences."

5 Jefferson's Works (Letter to William Rutledge, Feb. 2, 1788), 4:

"I am glad to hear that our new constitution is pretty sure of being accepted by states enough to secure the good it contains, and to meet such opposition in some others as to give us hopes it will be accommodated to them by the amendment of its most glaring faults, particularly the want of a declaration of rights."

5 Jefferson's Works (Letter to James Madison, Feb. 6, 1788), 5:

"I am glad to hear that the new constitution is received with favor. I sincerely wish that the nine first conventions may receive and the four last reject it. The former will receive it finally, while the latter will oblige them to offer a declaration of rights in order to complete the union. We shall thus have all its good, and cure its principal defect."

5 Jefferson's Works (Letter to James Madison, July 31, 1788), 45:

"I sincerely rejoice at the acceptance of our new constitution by nine states. It is a good canvas, on which some strokes only want retouching. What these are, I think are sufficiently manifested by the general voice from North to South, which calls for a bill of rights."

Id., 47:

"I hope therefore a bill of rights will be formed to guard the people against the federal government, as they are already guarded against their state governments in most instances."

5 Jefferson's Works (Letter to Francis Hopkinson, March 13, 1780), 76-7:

"I approved from the first moment, of the great mass of what is in the new constitution. * * * What I disapproved from the first moment also was the want of a bill of rights to guard liberty against the legislative as well as executive branches of the government, that is to say to secure freedom in religion, freedom of the press, freedom from monopolies, freedom from unlawful imprisonment, freedom from a permanent military, and a trial by jury in all cases determinable by the laws of the land. I disapproved also the perpetual reëligibility of the President. * * * My first wish was that the nine first conventions might accept the constitution, as the means of securing to us the great mass of good it contained, and that the four last might reject it, as the means of obtaining amendments. But I was corrected in this wish the moment I saw the much better plan of Massachusetts and which had never occurred to me. With respect to the declaration of rights I suppose the majority of the United States are of my opinion: for I apprehend all the anti federalists, and a very respectable proportion of the federalists think that such a declaration should now be annexed. The enlightened part of Europe have given us the greatest credit for inventing this instrument of security for the rights of the people * * *"

5 Jefferson's Works (Letter to Noah Webster, Dec. 4, 1790), 254-5:

"The purposes of society do not require a surrender of all our rights to our ordinary governors: that there are certain portions of right not necessary to enable them to carry on an effective government, and which experience has nevertheless proved they will be constantly encroaching on, if submitted to them: that there are also certain fences which experience has proved peculiarly efficacious against wrong, and rarely obstructive of right, which yet the governing powers have ever shown a disposition to weaken and remove. * * *

These fences against wrong, which they meant to exempt from the power of their governors, in instruments called declarations of rights and constitutions: and as they did this by conventions which they appointed for the express purpose of reserving these rights, and of delegating others to their ordinary legislative, executive and judiciary bodies, none of the reserved rights can be touched without resorting to the people to appoint another convention for the express purpose of permitting it."

6 Jefferson's Works (Letter to President Washington, Sept. 9, 1792), 104-5:

"No man in the United States I suppose approved of every title in the Constitution; no one, I believe approved more of it than I did. * * * My objection to the constitution was that it wanted a bill of rights. * * * Colo Hamilton's was that it wanted a king and house of lords. The sense of America has approved my objection and added the bill of rights, not the king and lords. I also thought a longer term of service, insusceptible of renewal, would have made a president more independent. My country has thought otherwise, and I have acquiesced implicitly. * * * Notwithstanding my wish

for a bill of rights, my letters strongly urged the adoption of the constitution, by nine states at least, to secure the good it contained. I at first thought that the best method of securing the bill of rights would be for four states to hold off till such a bill should be agreed to. But the moment I saw Mr. Hancock's proposition to pass the constitution as it stood and give perpetual instructions to the representatives of every state to insist on a bill of rights, I acknowledged the superiority of his plan, and advocated universal adoption."

5 Madison's Works (Letter to Thomas Jefferson, Oct. 24, 1787, enclosing a copy of the constitution), 22-3:

"The due partition of power between the general and local governments, was perhaps of all, the most nice and difficult. A few contended for an entire abolition of the states; some for indefinite power of legislation in the Congress, with a negative on the laws of the states; some for such a power without a negative; some for a limited power of legislation, with such a negative; the majority finally for a limited power without the negative. The question with regard to the negative underwent repeated discussions, and was finally rejected by a bare majority. As I formerly intimated to you my opinion in favor of this ingredient, I will take this occasion of explaining myself on the subject. Such a check on the states appears to me necessary.

1. To prevent encroachments on the general authority.

2. To prevent instability and injustice in the legislation of the states.

1. Without such a check in the whole over the parts, our system involves the evil of imperia in imperio. If a complete supremacy somewhere is not necessary in every society, a controlling power at least is so, by which the general authority may be defended against encroachments of the subordinate authorities, and by which the latter may be restrained from encroachments on each other. If the supremacy of the British Parliament is not necessary as has been contended, for the harmony of that Empire; it is evident I think that without the royal negative or some equivalent control, the unity of the system would be destroyed. The want of some such provision seems to have been mortal to the ancient confederacies, and to be the disease of the modern."

Id., 26-8:

"It may be said that the judicial authority, under our new system will keep the states within their proper limits, and supply the place of a negative on their laws. The answer is, that it is more convenient to prevent the passage of a law than to declare it void after it is passed; that this will be particularly the case, where the law aggrieves individuals, who may be unable to support an appeal against a state to the supreme judiciary; that a state which would violate the legislative rights of the Union, would not be very ready to obey a judicial decree in support of them * * *.

2. A constitutional negative on the laws of the states seems equally necessary to secure individuals against encroachments on their rights. The mutability of the laws of the states is found to be a serious evil. The injustice of

them has been so frequent and so flagrant as to alarm the most steadfast friends of Republicanism. I am persuaded I do not err in saying that the evils issuing from these sources contributed more to that uneasiness which produced the convention, and prepared the public mind for a general reform, than those which accrued to our national character and interest from the inadequacy of the confederation to its immediate objects. A reform therefore which does not make provision for private rights, must be materially defective. The restraints against paper emissions, and violations of contracts are not sufficient. Supposing them to be effectual as far as they go, they are short of the mark. Injustice may be effected by such an infinitude of legislative expedients, that where the disposition exists it can only be controlled by some provision which reaches all cases whatsoever. The partial provision made, supposes the disposition which will evade it."

5 Madison's Works (Speech on Amendments to the Constitution, June 8, 1789), 380-1:

"In the declaration of rights which that country" Great Britain "has established, the truth is, they have gone no farther than to raise a barrier against the power of the Crown; the power of the legislature is left altogether indefinite. * * * Yet their Magna Charta does not contain any one provision for the security of those rights, respecting which the people of America are most alarmed. * * *

A different opinion prevails in the United States. The people of many states have thought it necessary to raise barriers against power in all forms and departments of government, and I am inclined to believe, if once bills of rights are established in all the states as well as the Federal Constitution, we shall find that although some of them are rather unimportant, yet, upon the whole, they will have a salutary tendency."

Id., 385:

"It has been said that it is unnecessary to load the constitution with this provision" (a bill of rights), "because it was not found effectual in the constitution of the particular states. It is true, there are a few particular states in which some of the most valuable articles have not, at one time or other, been violated; but it does not follow but they may have to a certain degree a salutary effect against the abuse of power. If they are incorporated into the constitution, independent tribunals of justice will consider themselves in a peculiar manner the guardians of those rights; they will be an impenetrable bulwark against every assumption of power in the legislative or executive; they will be naturally led to resist every encroachment upon rights expressly stipulated for in the constitution by the declaration of rights. Besides this security, there is a great probability that such a declaration in the federal system would be enforced; because the state legislatures will jealously and closely watch the operations of this government, and be able to resist with more effect every assumption of power, than any other power on earth can do; and

the greatest opponents to a federal government admit the state legislatures to be sure guardians of the peoples liberty. I conclude, from this view of the subject, that it will be proper in itself, and highly politic, for the tranquillity of the public mind, and the stability of the government, that we should offer something, in the form I have proposed, to be incorporated in the system of government, as a declaration of the rights of the people."

VIII. All the framers of the constitution, who have expressed their opinions on the subject (except four, one of whom subsequently changed his views and agreed with the majority) approved of the judiciary refusing to execute acts in excess of or in contravention of the federal constitution.

Alexander Hamilton, *The Federalist*, No. 78 (9 *Hamilton's Works*, Lodge's ed.; 484-6):

"The complete independence of the courts of justice is peculiarly essential in a limited constitution. By a limited constitution, I understand one which contains certain specified exceptions to the legislative authority; such, for instance, as that it shall pass no bills of attainder, no *ex post facto* laws, and the like. Limitations of this kind can be preserved in practice no other way than through the medium of courts of justice, whose duty it must be to declare all acts contrary to the manifest tenor of the constitution void. Without this, all the reservations of particular rights or privileges would amount to nothing.

Some perplexity respecting the rights of the courts to pronounce legislative acts void, because contrary to the constitution, has arisen from an imagination that the doctrine would imply a superiority of the judiciary to the legislative power. * * *

There is no position which depends on clearer principles, than that every act of a delegated authority, contrary to the tenor of the commission under which it is exercised, is void. No legislative act, therefore, contrary to the constitution, can be valid. To deny this, would be to affirm, that the deputy is greater than his principal; that the servant is above his master; that the representatives of the people are superior to the people themselves; that men acting by virtue of powers, may do not only what their powers do not authorize, but what they forbid. * * *

The interpretation of the laws is the proper and peculiar province of the courts. A constitution is, in fact, and must be regarded by the judges, as a fundamental law. It therefore belongs to them to ascertain its meaning, as well as the meaning of any particular act proceeding from the legislative body.

If there should happen to be an irreconcilable variance between the two, that which has the superior obligation and validity ought, of course, to be preferred; or, in other words, the constitution ought to be preferred to the statute, the intention of the people to the intention of their agents.

Nor does this conclusion by any means suppose a superiority of the judicial to the legislative power. It only supposes that the power of the people is superior to both; and that where the will of the legislature, declared in its

statutes, stands in opposition to that of the people, declared in the constitution the judges ought to be governed by the latter rather than the former. They ought to regulate their decisions by the fundamental laws, rather than by those which are not fundamental."

James Madison, 5 Elliot's Debates, 355-6:

"Mr. Madison thought it clear that the legislatures were incompetent to the proposed changes. These changes would make essential inroads on the state constitutions; and it would be a novel and dangerous doctrine, that a legislature could change the constitution under which it held its existence. * * * He considered the difference between a system founded on the legislatures only, and one founded on the people, to be the true difference between a league or treaty, and a constitution. * * * In point of political operation, there were two important distinctions in favor of the latter. First, a law violating a treaty, ratified by a pre-existing law might be respected by the judges as a law, though an unwise or perfidious one. A law violating a constitution established by the people themselves would be considered by the judges as null and void. Secondly, the doctrine laid down by the law of nations in the case of treaties is, that a breach of any one article by any of the parties frees the other parties from their engagements.

In the case of a union of people under one constitution, the nature of the pact has always been understood to exclude such an interpretation." (See also 2 Farrand Records of the Federal Convention, 92-3.)

James Madison, 5 Elliot's Debates, 321:

"Mr. Madison considered the negative on the laws of the States as essential to the efficacy and security of the general government. The necessity of a general government proceeds from the propensity of the states to pursue their particular interests, in opposition to the general interest. This propensity will continue to disturb the system unless effectually controlled. * * * They will pass laws which will accomplish their injurious objects before they can be repealed by the general legislature, or set aside by the national tribunals. * * * In Rhode Island, the judges who refused to execute an unconstitutional law were displaced; and others substituted by the legislature, who would be the willing instruments of the wicked and arbitrary plans of their masters." (See also 2 Farrand, 27-28.)

James Madison, 5 Elliott's Debates, 164:

"An association of the judges in his revisionary function would both double the advantage and diminish the danger. It would also enable the judiciary department the better to defend itself against legislative encroachments." (See also 1 Farrand, 138:)

5 Elliot's Debates, 344-5:

"It would be useful to the judiciary department by giving it an additional opportunity of defending itself against legislative encroachments." (See also 2 Farrand, 74.)

James Madison (Virginia Convention), 3 Elliot's Debates, 532:

"The first class of cases to which its jurisdiction extends are those which may arise under the constitution, and this is to extend to equity as well as law. It may be a misfortune that, in organizing any government, the explication of its authority should be left to any of its coordinate branches. There is no example in any country where it is otherwise. There is a new policy in submitting it to the judiciary of the United States. That causes of a federal nature will arise, will be obvious to every gentleman who will recollect that the states are laid under restrictions, and that the rights of the union are secured by these restrictions."

William R. Davie, 4 Elliot's Debates (North Carolina Convention), 155-6

"For my own part, I know but two ways in which the laws can be executed by any government. If there be any other, it is unknown to me. The first mode is coercion by military force, and the second is coercion through the judiciary. With respect to coercion by force, I shall suppose that it is so extremely repugnant to the principles of justice and the feelings of a free people, that no man will support it. It must, in the end, terminate in the destruction of the liberty of the people. I take it therefore, that there is no rational way of enforcing the laws but by the instrumentality of the judiciary. From these premises we are left only to consider how far the jurisdiction of the judiciary ought to extend. It appears to me that the judiciary ought to be competent to the decision of any question arising out of the constitution itself. * * *

It is necessary in all governments, but particularly in a federal government, that its judiciary should be competent to the decision of all questions arising out of the constitution. * * * Without a judiciary, the injunctions of the constitution may be disobeyed, and the positive regulations neglected or contravened."

John Dickinson (2 Farrand, The Records of the Federal Convention, 299):

"Mr. Dickinson was strongly impressed with the remark of Mr. Mercer as to the power of the judges to set aside the law. He thought no such power ought to exist. He was at the same time at a loss what expedient to substitute. The judiciary of Aragon he observed became by degrees the lawgiver."

In one of his Fabino letters written in advocacy of the constitution in 1788 Dickinson says (Ford Pamphlets on the Constitution, 184):

"In the president and the federal independent judges, so much concerned in the execution of the laws, and in the determination of their constitutionality, the sovereignties of the several states and the people of the whole union, may be considered as conjointly represented."

Oliver Ellsworth, 2 Elliot's Debates (Connecticut Convention), 196:

"This constitution defines the extent of the powers of the general government. If the general legislature should at any time overleap their limits, the judicial department is a constitutional check. If the United States go beyond their powers, if they make a law which the constitution does not authorize

it is void; and the judicial power, the national judges, who, to secure their impartiality, are to be made independent, will declare it to be void. On the other hand, if the states go beyond their limits, if they make a law which is a usurpation upon the general government, the law is void; and upright, independent judges will declare it to be so." (See also 3 Farrand, 240-1.)

5 Elliot's Debates, 462-3:

"Mr. Gouverneur Morris thought the precaution as to *ex post facto* laws unnecessary, but essential as to bills of attainder.

Mr. Ellsworth contended, that there was no lawyer, no civilian, who would not say that *ex post facto* laws were void of themselves. It cannot, then, be necessary to prohibit them.

Mr. Wilson was against inserting anything in the constitution as to *ex post facto* laws. It will bring reflections on the constitution, and proclaim that we are ignorant of the first principles of legislation, or are constituting a government that will be so. * * *

Mr. Carroll remarked that experience overruled all other calculations. It had proved that, in whatever light they might be viewed by civilians or others, the state legislatures had passed them, and they had taken effect. * * *

Mr. Williamson.—Such a prohibitory clause is in the Constitution of North Carolina; and though it has been violated, it has done good there, and may do good here, because the judges can take hold of it." (See also 2 Farrand, 376.)

Elbridge Gerry, 5 Elliot's Debates, 151:

"Mr. Gerry doubts whether the judiciary ought to form a part of it" (the council of revision), "as they will have a sufficient check against encroachments on their own department by their exposition of the laws, which involved a power of deciding on their constitutionality. In some states the judges had actually set aside laws, as being against the constitution. This was done, too, with general approbation." (See also 1 Farrand, 97.)

Elbridge Gerry (in 1789 in debate on president's power of removal), 4 Elliot's Debates, 393:

"We then proceed to lay a duty of twenty or thirty dollars per head on the importation of negroes. The merchant does not construe the constitution in the manner that we have done. He therefore institutes a suit, and brings it before the supreme judicature of the United States for trial. The judges, who are bound by oath to support the constitution, declare against this law; they would therefore give judgment in favor of the merchant."

Elbridge Gerry (in 1789 on debate on secretary of foreign affairs), 1 Annals of Congress, 491-2:

"Are we afraid that the President and Senate are not sufficiently informed to know their respective duties? * * * If the fact is, as we seem to suspect, that they do not understand the constitution, let it go before the proper tribunal; the judges are the constitutional umpires on such questions."

William Grayson (Virginia Convention), 3 Elliot's Debates, 567:

"If the Congress cannot make a law against the constitution, I apprehend they cannot make a law to abridge it. The judges are to defend it. They can neither abridge nor extend it."

Governor Johnston (North Carolina Convention), 4 Elliot's Debates, 187-8:

"The Constitution must be the supreme law of the land; otherwise, it would be in the power of any one state to counteract the other states, and withdraw itself from the Union.

The laws made in pursuance thereof by Congress ought to be the Supreme law of the land; otherwise any one state might repeal the laws of the Union at large. Without this clause, the whole Constitution would be a piece of blank paper. Every treaty should be the supreme law of the land; without this, any one state might involve the whole Union in war. * * *

Every law consistent with the Constitution will have been made in pursuance of the powers granted by it. Every usurpation or law repugnant to it cannot have been made in pursuance of its powers. The latter will be nugatory and void."

Rufus King (1 Farrand, Records of the Federal Convention, 98):

"Mr. King seconds the motion, observing that the Judges ought to be able to expound the law as it should come before them, free from the bias of having participated in its formation."

Rufus King (1 Farrand, 109):

"Mr. King was of opinion that the Judicial ought not to join in the negative of a law, because the Judges will have the expounding of those laws when they come before them; and they will no doubt stop the operation of such as shall appear repugnant to the constitution."

John Marshall, 3 Elliot's Debates (Va. Convention), 553:

"Has the government of the United States power to make laws on every subject? Does he understand it so? Can they make laws affecting the mode of transferring property, or contracts, or claims, between citizens of the same state? Can they go beyond the delegated powers? If they were to make a law not warranted by any of the powers enumerated, it would be considered by the judges as an infringement of the constitution which they are to guard. They would not consider such a law as coming under their jurisdiction. They would declare it void."

Luther Martin, 5 Elliot's Debates, 346-7:

"Mr. L. Martin considered the association of the judges with the executive as a dangerous innovation, as well as one that could not produce the particular advantage expected from it. A knowledge of mankind, and of legislative affairs, cannot be presumed to belong in a higher degree to the judges than to the legislature. And as to the constitutionality of laws, that point will come before the judges in their official character. In this character they have a negative on the laws. Join them with the executive in the revision, and they will have a double negative." (See also 2 Farrand, 76.)

Luther Martin's letter to Maryland Convention, of which State he was Attorney General, 1 Elliot's Debates, 380:

"Whether, therefore, any laws or regulations of the Congress, any acts of its President or other officers, are contrary to, or not warranted by the Constitution, rests only with the judges, who are appointed by Congress, to determine; by whose determinations every state must be bound."

George Mason, 5 Elliot's Debates, 347:

"It has been said (by Mr. L. Martin), that if the judges were joined in this check on the laws, they would have a double negative, since in their expository capacity of judges they would have one negative. He would reply, that in this capacity they could impede in one case only the operation of laws. They could declare an unconstitutional law void." (See also 2 Farrand, 78.)

Gouverneur Morris, 5 Elliot's Debates, 321:

"Mr. Gouverneur Morris was more and more opposed to the negative. The proposal of it would disgust all the States. A law that ought to be negative will be set aside in the judiciary department, and, if that security should fail, may be repealed by a national law." (See also 2 Farrand, 28.)

5 Elliot's Debates, 355:

"Legislative alterations not conformable to the federal compact would clearly not be valid. The judges would consider them as null and void." (See also 2 Farrand, 92.)

Carson's History, Supreme Court of the United States, 122, quotes Gouverneur Morris "Address to the Assembly of Pennsylvania against the abolition of the Charter of the Bank of North America," delivered in 1785, as saying:

"The boasted omnipotence of legislative authority is but a jingle of words. In the literal meaning, it is impious. And whatever interpretation lawyers may give, freemen must feel it to be absurd and unconstitutional. Absurd, because laws cannot alter the nature of things, unconstitutional, because the Constitution is no more if it can be changed by the legislature. A law was once passed in New Jersey which the judges pronounced to be unconstitutional, and therefore void. Such power in judges is dangerous; but unless it somewhere exists the time employed in framing a bill of rights and form of government was merely thrown away."

Charles Pinckney (South Carolina Convention), 4 Elliot's Debates, 257-8:

"The judicial he conceived to be at once the most important and intricate part of the system. That a supreme federal jurisdiction was indispensable, cannot be denied, * * * It may be easily seen that, under a wise management, this department might be made the keystone of the arch, the means of connecting and binding the whole together * * * that, in republics, much more (in time of peace) would always depend upon the energy and integrity of the judicial than on any other part of the government—that, to insure these extensive authorities were necessary; particularly so were they in a tribunal constituted as this is, whose duty it would be not only to decide all national

questions which should arise within the Union, but to control and keep the State judicials within their proper limits whenever they shall attempt to interfere with its power."

Edmund Randolph, 3 Elliot's Debates (Va. Convention), 205:

"If Congress wish to aggrandize themselves by oppressing the people, the judiciary must first be corrupted! No man says anything against them; they are more independent than in England."

Edmund Randolph's letter to Washington, August 5, 1792 (10 Sparks' Life of Washington, 513):

"It is much to be regretted, that the judiciary in spite of their apparent firmness in annulling the pension law, are not what sometime hence they will be, a resource against the infractions of the constitution on the one hand, and a steady asserter of the federal rights on the other."

Roger Sherman, 5 Elliot's Debates, 321:

"Mr. Sherman thought it" (congressional power to negative all state laws) "unnecessary, as the courts of the States would not consider as valid any law contravening the authority of the Union, and which the legislature would wish to be negated." (See also 2 Farrand, 27.)

5 Elliot's Debates, 321-2:

"Mr. Sherman.—Such a power involves a wrong principle—to wit, that a law of a state contrary to the Articles of the Union would, if not negated, be valid and operative." (See also 2 Farrand, 28.)

John Rutledge (In Congress, 1802), endorsing Hamilton's views, said (4 Elliot's Debates, 446):

"The complete independence of the courts of justice is essential in a limited constitution; one containing specified exceptions to the legislative authority; such as that it shall pass no *ex post facto* law, no bill of attainder, etc. Such limitations can be preserved in practice no other way than through the courts of Justice, whose duty it must be to declare all acts manifestly contrary to the Constitution void. Without this, all the reservations of particular rights or privileges of the states or the people would amount to nothing."

James Wilson, 5 Elliot's Debates, 344:

"It had been said that the judges, as expositors of the laws, would have an opportunity of defending their constitutional rights. There was weight in this observation; but this power of the judges did not go far enough. Laws may be unjust, may be unwise, may be dangerous, may be destructive, and yet may not be so unconstitutional as to justify the judges in refusing to give them effect. Let them have a share in the revisionary power, and they will have an opportunity of taking notice of those characters of a law, and of counteracting, by the weight of their opinions, the improper views of the legislature. Mr. Madison seconded the motion." (See also 2 Farrand, 73.)

James Wilson, 2 Elliot's Debates (Pa. Convention), 489:

"The honorable gentleman from Cumberland (Mr. Whitehill) says that

laws may be made inconsistent with the Constitution; and that therefore the powers given to the judges are dangerous. For my part, Mr. President, I think the contrary inference is true. If a law should be made inconsistent with those powers vested by this instrument in Congress, the judges, as a consequence of their independence, and the particular powers of government being defined, will declare such law to be null and void; for the power of the Constitution predominates. Anything, therefore, that shall be enacted by Congress contrary thereto, will not have the force of law."

Of the four framers of the Constitution, who during the debates in the Federal convention or prior to its adoption expressed the opinion that judges should not refuse to enforce unconstitutional laws, John Dickinson of Delaware changed his views. (See his later views quoted above.)

Gunning Bedford of Delaware, John F. Mercer of Maryland and Richard Spaight of North Carolina were probably among the supporters of a council of revision (like the Federal Council of the German Empire), or a Congressional negative on state laws.

VIII. The opposition to the Federal constitution was led by three classes of popular leaders.

Demagogues, like those who in Rhode Island ruled and preyed by playing upon the prejudices of the farmers as against professional men, merchants and inhabitants of the towns. The demagogues advocated State bills of credit which were legal tender for their fiat value, but which were worthless in specie; stay laws; laws for the confiscation of loyalists' property and other forms of State confiscation, repudiation, and spoliation that the Federal Constitution was designed to and did put an end to.

Patriots like Patrick Henry, who were extreme States rights men, and who believed that the new Federal Government armed with the purse in the power of direct taxation in lieu of requisitions upon the States; with the sword in the standing army and navy in lieu of requisitions for State militia, but without any bill of rights to restrain it from tyranny, would gradually absorb the rights of the States, and might suppress the rights of the citizen as well.

Henry feared that the independence of the State judiciary would be destroyed, and that in the absence of a bill of rights to restrain Congress, unless the Federal courts rigidly upheld the Federal constitution, a consolidated congressional despotism might be substituted for the parliamentary one that the revolution had overthrown.

(3 Elliot's Debates, 49-61, 137, 151-5, 157, 169, 314, 445-8, 539-45; 4 Samuel Adams' Works (Cushing ed.), 324-5 333-4.)

Melancton Smith, who in the New York Convention, feared that Congress would interpret the constitution for itself, and thus create a consolidated congressional despotism, which the Federal Courts could not or would not check. (Annulment of Legislation by Supreme Court, Horace A Davis, 7 Am. Pol. Science Review, 575-6.)

Lawyers like Robert Yates, who claimed that the Federal Courts would gradually absorb the supreme power and subvert the State Governments. (Annulment of Legislation by Supreme Court, Horace A. Davis, 7 Am. Pol. Science Review, 577-9; see, also, John Dickinson's views quoted above.)

The demagogues' fears have been forgotten.

Henry's and Smith's fears were realized to some extent in the South during reconstruction; Yates's and Dickinson's fears have never been realized.

IX. Following the American Revolution, the English Privy Council and court of King's Bench, without expressly overruling the decisions of Lord Coke, Lord Hobart and Lord Holt that an act of parliament contrary to natural equity or the rights of Englishmen was void, upon which the legal justification of the successful American Revolution was founded, made a series of decisions establishing the omnipotence of parliament. They hold that parliament was not merely the supreme legislature for the kingdom of Great Britain, but its highest court as well, under the name of the High Court of Parliament.

For the last hundred years the acts of the High Court of Parliament, whether legislative or judicial, can no more be questioned by an inferior British court than the decisions of our court of last resort within its jurisdiction can be questioned by a justice of the peace.

Kielly v. Carson, 4 Moore Privy Council, 89-90.

Burdett v. Abbot, 14 East, 135, 138, 141, 159-160.

Stockdale v. Hansard, 9 Adol. & Ellis, 109, 127, 130.

Kilbourn v. Thompson, 103 U. S., 183-5.

X. The experience of the modern German Empire, where a strong federal council is the primary and the imperial courts the secondary means of establishing the precedence of the Imperial laws over the State laws and of settling conflicts between the Federal and State jurisdiction, demonstrates the necessity of some tribunal to adjust conflicts in any successful federation. The German Empire, federated by blood and iron as the result of three foreign wars in the course of seven years, was strong enough to put into its federal constitution what James Madison and his supporters failed to get into our constitution, namely, a strong federal council of revision. Even in the German Empire, however, to a limited extent the Imperial Courts have had to declare State laws or ordinances inoperative in order to enforce the precedence of the imperial laws. From the time of Magna Charta (1215); the English Petition of Right (1627), 3 Char. I, c. 1; the Habeas Corpus Act (1640), 16 Char. I, c. 10, §8; the Bill of Rights following the revolution of 1688 (1689), 1 Wm. and Mary, c. 2; the Act of Settlement (1700), 12-13 William III, c. 2; and the acts of parliament constituting the Dominion of Canada, the Commonwealth of Australia and the Union of South Africa, demonstrate that in Anglo-Saxon communities a bill of rights, while not always obeyed, and sometimes openly disregarded, is as necessary as the balance wheel of a watch. The bills of rights contained in the first ten amendments, also in the 13th, 14th and 15th

amendments of the Federal Constitution, as well as the bill of rights in every one of the forty-eight State constitutions are further illustrations of this axiom.

The work of Madison, Hamilton, Pinckney, Patterson and Wilson in drafting the original Federal Constitution has not only proved more flexible, but of late years it has excited less sectional and class opposition than the radical procedural and individualistic bill of rights embodying the ideas of Jefferson, Patrick Henry and Samuel Adams, contained in the first ten amendments, or the economical, social, political, and individualistic, as well as racial, bill of rights embodying the ideas of the anti-slavery leaders Chase and Seward, Senators Sumner, Howard, Stewart and Wilson, and Congressmen Stevens and Bingham contained in the fourteenth and fifteenth amendments. (Flack, *The Adoption of the 14th Amendment*, 7-9, 11, 14-7, 20-38, 40-54, 56-61, 63-9, 71, 73-84, 85, 86, 87, 91-4, 96-7, 140, 144-55, 158-60, 166, 169, 173-87, 192, 194-200.) In the bill of rights as embodied in the first ten amendments the procedural theories of a prior generation have been either intermingled with or put on the same plane with fundamental natural rights. It might have been wiser had the procedural views of each generation been embodied in the revised statutes only, instead of in the amendments to the constitution. Likewise some radical French Revolutionary ideas have been toned down from their original revolutionary motto of "Liberty, Equality and Fraternity (or Death)," into the idealistic idea of equality before the laws or equal protection of the laws, meaning not merely protection from the unequal making of the laws, but also from their unequal enforcement. In view of the fact that the French, who originated these idealistic theories, have never dared to reduce them to an inflexible constitutional written form that some court was charged with the duty of enforcing against all legislation to the contrary, it is not surprising that the Supreme Court has construed the fourteenth and fifteenth amendments very conservatively.

Up to 1889, out of 1,736 proposed amendments to the Federal Constitution, of which six specifically related to the Supreme Court's jurisdiction, only fifteen were adopted. (Ames' *Proposed Amendments to the Constitution*, Annual Report American Historical Association, 1896, Vol. 2, pp. 306-421; Mr. Justice Lurton's address, 1900, 21 *Proceedings Ohio State Bar Association*, 186-8.) Since then the sixteenth and seventeenth amendments were adopted, and many proposed amendments were introduced; about seventy in the present Congress.

Notwithstanding that some of the procedural provisions incorporated in the bill of rights contained in the amendments of 1789 as restrictions on the more flexible procedural provisions of the original constitution, are not in accord with the modern State practice (*Slocum v. New York Life Ins. Co.*, 228 U. S., 364-5, 375-80, 387, 400-8, 418-22, 428), and some of them are in fact archaic, what if any written instrument for the government of a great federation can show less changes in 127 years?

CONCLUSION

In a federal democratic republic, court review of the validity of State and Federal laws, or else a Federal revisory council, with plenary power to veto, repeal, annul, revise or suspend State and Federal laws, is the only peaceful means of solving the inevitable conflicts between the forty-nine legislative units (1 federation and 48 states), also of upholding the constitutional bill of rights. No large federation (whether republican, imperial or monarchical) is willing to give its Federal council plenary power in times of peace, to veto, repeal, annul, revise or suspend all or any State and Federal laws in whole or in part. It is doubtful if any one Federal council (generally acting *ex parte*) could do this work for forty-nine legislative units either as well as the courts now do it or without more delay and friction than the courts now give rise to. In no free or English speaking country since Magna Charta have the voters ever been willing to give to each of forty-nine different legislative units plenary or absolute power over life, liberty and property, or to abolish the bill of rights in time of peace.

Several distinguished European publicists of the middle or latter part of the 19th century overlooked, either in whole or in part, the judicial activities of the British Privy Council as well as of the Courts of the Commonwealths, Dominions and Colonies of the British Empire, besides some South American countries, as well as the occasional Continental European Court's action in refusing to execute *ultra vires* laws, and have erroneously assumed that the American practice of court review is "unique" (Maine Popular Government, 217-8; 1 DeTocqueville Democracy in America (1862 ed.), 123-30; (1889 ed.), 94-100; 1 Bryce American Commonwealth (1889 ed.), 237-58). Some distinguished publicists and American Law school professors (not including the late Professor James Bradley Thayer or Professor Dicey, The Law of the Constitution, 1908 ed., 96-105, 160-9), also adopted this view (Rogers Constitutional History, Introduction, pp. 9-14).

Latterly numerous American leaders of thought and action, as well as many newspapers and magazine editors and writers, partly in reliance on the modern German theory of imperial absolutism, reached the erroneous view that the American practice of judicial review was not only unique, but archaic, and therefore should be abolished, curtailed or restricted.

The views of the extreme State rights or socialistic minority, who ever since the adoption of the Federal constitution have asserted that the courts usurp power in reviewing the validity of any law, were at first founded upon the *ultra* States rights theory that the Federal constitution was a mere treaty between independent and sovereign States, like Great Britain, Germany or Russia. Since the Civil War the views of those who assert that each of our forty-nine legislative units has absolute and plenary power, have been largely founded upon the assertions of Chief Justice Walter Clark of North Carolina, Senator

Robert L. Owen of Oklahoma as well as of Luis B. Boudin and Gilbert E. Roe that the proposal for judicial annulment was four times defeated in the Federal Constitutional Convention of 1787, as averred by Chief Justice Clark and Senator Owen, viz.: on June 4 or 5, June 6, July 21, and August 15, 1787. (Chief Justice Walter Clark, *Government by Judges*, Cooper Union Address, January 27, 1914, pp. 10-11; *Some Defects in the Constitution of the United States*, April 27, 1906, pp. 10-11; Senator Owen, *Congressional Record*, July 31, 1911, Vol. 47, pp. 3367-8; Boudin, *Government by Judiciary*, 26 *Political Science Quarterly*, 248; Roe, *Our Judicial Oligarchy*, 25-8.) No proposal or resolution for court review of laws was ever defeated in the Federal Convention. On June 4, the Convention did postpone a resolution for a Federal Council of Revision, including the Judiciary, to revise or veto laws. (1 Farrand *Records of the Federal Convention*, 97-8, 107-114.) On June 6, it defeated a motion to associate the judges with the executive as a Federal Council in the exercise of the revisionary and veto power. (1 Farrand, 131, 138-141.) On June 8, it defeated a resolution giving Congress a negative on State laws. (1 Farrand, 164-173.) On July 17, it again defeated a resolution giving Congress a negative on State laws. (2 Farrand, 27-28.) On July 21, it again defeated a resolution associating the Judiciary with the Executive in the Council of Revision to revise and veto laws. (2 Farrand, 73-80.) On August 15, it again defeated a resolution associating the Judiciary with the Executive in the Council of Revision to revise or veto laws. (2 Farrand, 298.)

The Federal Convention of 1787 had before it (1) Madison's and Hamilton's proposal for a Federal Council of Revision with veto power, of which the Judiciary were to be members; (2) A Congressional negative or power to repeal State laws, and (3) Judicial review of State and Federal laws. After defeating the Federal revisory council project as well as the Congressional repeal of State laws project, it deliberately and consciously adopted the third alternative, to wit: judicial review of all laws in excess of or in contravention of the Constitution.

(James Madison's letter of October 24, 1787, to Thomas Jefferson, enclosing copy of constitution, 5 *Madison's Works*, 22-23, 26-8; 3 *Farrand Records of the Federal Convention*, 133-5; Madison's *Speech on Amendments to Constitution*, June 8, 1789, 5 *Madison's Works*, 380-1, 385; Madison's letter of December, 1831, to N. P. Trist, 3 *Farrand*, 516; Madison's letter of October 21, 1833, to W. C. Rives, quoting Jefferson's view, 3 *Farrand*, 522-4; Thomas Jefferson, 5 *Jefferson's Works* (Ford ed.), 80-1; 4 *Jefferson's Works*, 476-7; 5 *Jefferson's Works*, 5, 45, 47, 76-7; Alexander Hamilton, *The Federalist*, No. 78, 9 *Hamilton's Works*, Lodge's ed., 484-6.)

On July 17, 1787, the Federal Convention "unanimously"

"Resolved, That the legislative acts of the United States made by virtue and in pursuance of the articles of Union and all Treaties made and ratified under the authority of the United States shall be the Supreme law of the respective

states as far as those acts or Treaties shall relate to the said States, or their citizens and inhabitants—and that the Judiciaries of the several States shall be bound thereby in their decisions, anything in the respective laws of the individual states to the contrary notwithstanding.” (2 Farrand, Records of the Federal Convention, p. 22.)

On July 17, 1787, after the propositions for a Federal revisory council, also for a congressional power of repeal or negative upon State laws had been defeated (1 Farrand, 94-5, 97-8, 107-114, 131, 138-141, 164-71; 2 Farrand, 27-8, 73-80), “Mr Luther Martin moved the following resolution ‘that the legislative acts of the United States made by virtue and in pursuance of the articles of Union, and all treaties made and ratified under the authority of the United States shall be the Supreme law of the respective States, as far as those acts or treatis shall relate to the said States, or their citizens and inhabitants—and that the Judiciaries of the several States shall be bound thereby in their decisions, aneything in the respective laws of the individual States to the contrary notwithstanding,’ which was agreed to nem. con.,” that is, unanimously. (2 Farrand, 28-9.)

In the Committee of Detail this section (then numbered Article 9) was revised to read:

“The acts of the Legislature of the United States made in pursuance of this Constitution, and all Treaties made under the authority of he United States shall be the Supreme Law of the several States, and of their citizens and inhabitants; and the Judges in the several States shall be bound thterebly in their decisions, anything in the Constitutions or Laws of the Several States to the contrary notwithstanding.” (2 Farrand, 169.)

On August 23, 1787, “Mr. Rutledge moved to amend Article VIII” (as it was then numbered) “to read as follows:

“‘This Constitution and the laws of the U. S. made in pursuance thereof, and all Treaties made under the authority of the U. S. shall be the Supreme Law of the several states and of their citizens and inhabitants; and the Judges in the several states shall be bound thereby in their decisions, anything in the Constitution or laws of the several states, to the contrary notwithstanding,’ which was agreed to, nem. contrad.” (2 Farrand, 389.)

On August 25, 1787, this section was “On motion of Mr. Madison, 2d, ed., by Mr. Govr. Morris, Art. VIII, was reconsidered and after the words ‘all treaties made,’ were inserted nem. con., the words ‘or which shall be made.’” (2 Farrand, 417.)

As amended and renumbered by the committee of style, this section read as it now does:

“This constitution, and the laws of the United States which shall be made in pursuance thereof; and all treaties made, or which shall be made, under the authority of the United States, shall be the Supreme law of the land; and the judges in every state shall be bound thereby, anything in the constitution or laws of any state to the contrary notwithstanding.” (2 Farrand, 603, 663.)

What is now Art. 3, § 2 of the Federal Constitution as revised by the Committee of Detail read:

"Art. 14. XXXX The jurisdiction of the Supreme (National) Court shall extend to all cases arising under laws passed by the legislature of the United States; to all cases affecting Ambassadors. * * *" (2 Farrand, 172.)

On August 27, 1787, "Dr. Johnson suggested that the judicial power ought to extend to equity as well as law—and moved to insert the words 'both in law and equity' after the words 'United States,'" * * * which was agreed to by a vote of six states to two (2 Farrand, 428); on the same day "Dr. Johnson moved to insert the words 'this constitution and the' before the word 'laws.' * * *

"The motion of Dr. Johnson was agreed to nem. con." * * * (2 Farrand, 430.)

In the committee of style this section was revised to read: "The judicial power shall extend to all cases, both in law and equity, arising under this constitution, the laws of the United States, and treaties made, or which shall be made, under their authority" * * * (2 Farrand, 600); and that in the constitution as signed the word "both" was stricken out. (2 Farrand, 660-1.)

The proposition originally made by Mr. Holder of South Australia for the recall of judicial decisions on constitutional questions by plebiscite or popular vote, as modified by his American disciples to apply to decisions of State courts only, would not defeat the 14th amendment of the Federal Constitution guaranteeing among other things to every one within the jurisdiction of the United States, due process of law and the equal protection of the laws, for the alleged contravention of which nearly all important statutes, the constitutionality of which is now questioned, are assailed. There is no difference between the constitutionality or unconstitutionality under the Federal constitution of a State statute adopted by popular vote and of a statute enacted by the legislature; in such a case the legislature becomes a co-ordinate legislative body with the voters. (*Pacific Telephone Co. v. Oregon*, 223 U. S., 118, 150; *Straw v. Harris*, 54 Oregon, 431; *State v. Richardson*, 48 Oregon, 310, 319; *Kadderly v. Portland*, 44 Oregon, 119, 135, 145-6.) There is no legal difference between the Federal Court of last resort reviewing the decision of a State court the majority of whose members, viz.: the thirty-two State Senators, are lay judges (*Gibbons v. Ogden*, 17 John., 488; *revd.*, 9 Wheaton, 1), and reviewing the decision of a State court of last resort composed wholly of lay judges, viz.: in practice usually a majority of a minority of the electorate, or in rare instances a majority of a bare majority of the electorate.

If a recalled State decision be deemed an amendment to the State constitution, a State constitutional provision in contravention of the Federal constitution is void. (*White v. Hart*, 13 Wall., 646, 653-4; *Gunn v. Barry*, 15 Wall., 611, 623-4.)

This Committee therefore respectfully presents the following resolutions:
Dated November 28, 1914.

HENRY A. FORSTER,
EVERETT P. WHEELER,
CHARLES H. BECKETT,
FREDERICK D. COLSON
EVERETT V. ABBOT.

Resolved, That in federations possessing a written fundamental law, it is the duty of the courts to uphold the fundamental law as against legislation in contravention thereof by refusing to enforce, as *ultra vires* or unconstitutional, all statutes in excess of or in contravention of the fundamental law, save and except where the written fundamental law of the federation confers upon the federal council or some body with the powers of a federal council plenary and exclusive jurisdiction to determine conflicts between the fundamental law and ordinary statutes, as well as to enforce the bill of rights.

Resolved, Further, that in a federal democratic republic with 49 legislative units (1 federation and 48 states) either judicial review or else a supreme federal council with plenary power to revise, veto, annul or suspend all legislation, both federal and state, either in whole or in part, is the effective and preferable means of resolving the inevitable conflicts between the constitution and the rights and duties of the federation and the legislation in 49 legislative units as well as to uphold and enforce the bill of rights.

Resolved, Further, that the experience of 134 years of court review of unconstitutional or *ultra vires* laws has demonstrated that not only the citizens of the United States, but those of the British Empire and of several other countries as well, where there is no federal council with plenary power to veto, annul, repeal or suspend laws, prefer court review to the establishment of a federal council with absolute power to veto, annul, repeal or suspend all or part of any legislation, state or federal.

These resolutions were adopted by the Association, January 23, 1915. (Report for 1915, pp. 367, 371.)

DUTY OF COURTS TO REFUSE TO EXECUTE STATUTES IN CONTRAVENTION OF THE FUNDAMENTAL LAW

To the New York State Bar Association:

The undersigned, the special committee upon the duty of courts to refuse to execute statutes in excess of or in contravention of the fundamental law, respectfully report as follows:

Following the approval of the resolutions accompanying your committee's first report and the printing of both report and resolutions as Senate Document 941, Sixty-third Congress, third session, presented by Senator O'Gorman, a large number of copies of such report were distributed to other bar associations,

to the press, to the various press associations, to the magazines, to many law reformers, to some public libraries, to many law-school libraries, university libraries, and college libraries throughout the Nation.

The following is a list of the principal articles since the publication of your committee's first report, either supporting or combating the theory of the usurpationists that any decision enforcing the Constitution as against a conflicting statute was either a judicial usurpation or else an extra legal act:

CHARGE OF JUDICIAL USURPATION WHEN COURTS REVIEW
UNCONSTITUTIONAL LAWS

Howe, Dr. Frederic C., *Globe*, April 28, 1915: Legislature Should be Given Absolute Power in All Matters Relating to Social Justice.

Seager, Prof. Henry Rogers, *New York Times*, March 30, 1915: Defenses of Judicial Review of Legislation.

Haines, Prof. Charles G.: Judicial Review of Legislation in Canada, 28 *Harvard Law Review*, 565-588.

Watson, David K.: Invalid Legislation, Senate Document No. 964, Sixty-third Congress, third session.

Wheeler, Everett P.: The Supreme Court a Coordinate Branch of the United States Government, 24 *Yale Law Review*, 300-315.

No further article has been discovered by your committee advocating the views of the American followers of Mr. Holder, of South Australia, that the enforcement of the Constitution by the State courts is so unique and archaic that it should be curtailed by State plebiscites as to the propriety or impropriety of any specific State court decision, ignoring the duty of both Federal and State courts to review the validity of all State laws impairing the obligation of contracts, or denying due process of law or the equal protection of the laws under the Federal Constitution.

Historically the genesis of the proposal for the recall of judicial decisions seems to have arisen in the resolution introduced by Mr. Holder, of South Australia, in the Australasian Federal Convention of 1898, to the effect that in the event of any Commonwealth law being declared ultra vires by the high court, the executive may, upon a majority vote of each house of the legislature, refer the law to a plebiscite of the electors, and if approved by them the constitution shall be deemed to have been enlarged, and the law shall be deemed to have been intra vires from the passing thereof. This resolution was withdrawn by Mr. Holder after a debate in which it appeared that he had no supporters in the Australasian constitutional convention. (II Official Record of the Debates of the Australasian Federal Convention, Melbourne, 1898, 1717-1721, 1723-1732; Moore *Constitution of the Commonwealth*, 2d ed., 360, 361.)

I. GENESIS OF THE CAMPAIGN OF 1912 FOR THE TOTAL OR PARTIAL SUPPRESSION OF JUDICIAL REVIEW OF THE VALIDITY OF LAWS

In "Nationalism and the judiciary," ex-President Roosevelt says (Outlook, Mar. 4, 1911, p. 490):

"The Supreme Court itself, for the great benefit of the Nation, read its own place into the Constitution after the lapse of years, during which no one, none even of the founders of the Constitution, had dreamed of giving it such a place."

And further (p. 491):

"Those who, on abstract grounds, insist that the courts never have anything to do with the embodiment of public policy into law ought to pay heed to the simple fact, that under Marshall, the Supreme Court of the United States worked a tremendous revolution, not merely in ordinary law but in the fundamental constitutional law of the land. When Marshall was appointed, as Judge Spring has shown, it was usually assumed, when the subject was discussed at all, that Congress, like the English House of Commons, could pass upon the validity of its own acts. When the adherents of Jefferson and Madison opposed this proposition, as they did in the Kentucky and Virginia resolutions, the position they took was that the legislature of each State was a judge of constitutional matters at issue between the States and the Nation and that the States could declare void an act of Congress. No one at the time thought of turning to the Supreme Court as the arbiter in such a matter, and this, although the men who had made the Constitution were administering it. But Marshall, in his first constitutional opinion, in an argument which, as Chancellor Kent said approached to the decision and certainty of a mathematical demonstration, held that the Supreme Court possessed in itself the ultimate power to declare whether or not an act of Congress was void. Nowadays the authority of the court to decide that an act of the legislative department, whether of the Nation or of any of the States, is repugnant to the Constitution seems self-evident. But no such power was expressly prescribed in the Constitution, and not only Jefferson but Jackson, with an emphasis amounting to violence, denounced Marshall's position and asserted that no such power existed. The reason why Marshall was so great a Chief Justice, the reason why he was a public servant whose services were of such incalculable value to our people, is to be found in the very fact that he thus read into the Constitution what was necessary in order to make the Constitution march."

In "Wisconsin: An object lesson for the rest of the Union," ex-President Roosevelt says (Outlook, May 27, 1911, pp. 143, 144):

"I doubt whether American students of social economics fully realize the extraordinary work that has been accomplished during the last decade and is now being accomplished in the State of Wisconsin under the lead of Senator La Follette and of the group of entirely practical and at the same time zealously

enthusiastic workers who have come into active control of the State mainly or largely because of the lead he has given them. * * * We, who boast that we represent the freest people on the face of the earth, that our Nation is the home of popular rights and equal rights, and of justice as between man and man, when we try to translate our words into deeds, have to go to Australia for our ballot and have to study what is done in England or Germany for the protection of wageworkers (and, having studied them and tried to follow the example set for us, are then obliged to see some State court, still steeped in the political philosophy of the eighteenth century, solemnly declare that America, alone among civilized nations, is incompetent to right industrial wrongs). * * *

"But, for our good fortune, one of our States—the State of Wisconsin—has now developed such a body of public opinion and such a body of leadership among its public men and its students that hereafter we have good reason to hope that we can find within our own borders what we need. We can now, at least in many cases, look for leadership to Wisconsin when we desire to try to solve the great social and industrial problems of the present and the future, instead of being forced always to look abroad."

Theodore Roosevelt, "Nationalism and progress" (Outlook, Jan. 14, 1911, p. 59), says:

"Wisconsin offers the best case in point. Under the leadership of Senator La Follette, Wisconsin during the last decade has advanced at least as far as, and probably further than, any other State in securing both genuine popular rule and the wise use of the collective power of the people to do what can not be done by merely individual effort, the University of Wisconsin, by the way, playing a very important part in the movement."

Theodore Roosevelt, "A charter of democracy" (Outlook, Feb. 24, 1912, p. 393), says:

"Among the States that have entered this field Wisconsin has taken a leading place. Following Senator La Follette, a number of practical workers and thinkers in Wisconsin have turned that State into an experimental laboratory of wise governmental action in aid of social and industrial justice. They have initiated the kind of progressive government which means not merely the preservation of true democracy, but the extension of the principle of true democracy into industrialism as well as into politics."

While ex-President Roosevelt was not unwilling that the judges of some elective State courts of last resort should be criticized as fossilized or reactionary because they enforced the fourteenth amendment as they interpreted it, he avoided impugning their motives. (Theodore Roosevelt, "The judges the lawyers, and the people," Outlook, Aug. 31, 1912, p. 1004; "The right of the people to rule," Outlook, Mar. 23, 1912, p. 619.)

Beginning two weeks after the publication of ex-President Roosevelt's indorsement of Senator La Follette and his Wisconsin adoption of German ideas

La Follette's Weekly Magazine published, or commended, three articles, all charging the Federal Supreme Court with judicial usurpation in holding any laws unconstitutional, and one of which charged some dead justices of the Federal Supreme Court with servility as well.

On June 3, 1911, La Follette's Weekly Magazine reprinted ex-President Roosevelt's Outlook article of May 27, 1911, heretofore quoted.

On June 10, 1911, it editorially called to its readers' attention as "among the most valuable and interesting contributions upon matters of government that have appeared in recent years" "Our judicial oligarchy," by Gilbert E. Roe, which it published as a weekly serial commencing June 17, 1911, and ending September 16, 1911.

When "Our judicial oligarchy" was published in book form in 1912, Senator La Follette indorsed Mr. Gilbert E. Roe's view that "the courts have usurped the power to declare laws unconstitutional" (pp. 17, 23-29) in the following terms (introduction by Robert M. La Follette, pp. vi-vii):

"The judiciary has grown to be the most powerful institution in our government. * * * Evidence abounds that as constituted to-day the courts pervert justice almost as often as they administer it. Precedent and procedure have combined to make one law for the rich and another for the poor. * * * Moreover, by usurping the power to declare laws unconstitutional and by presuming to read their own views into statutes without regard to the plain intention of the legislators, they have become in reality the supreme lawmaking and lawgiving institution of our government. They have taken to themselves a power it was never intended they should exercise; a power greater than that intrusted to the courts of any other enlightened nation. And because this tremendous power has been so generally exercised on the side of the wealthy and powerful few, the courts have become at last the strongest bulwark of special privilege. They have come to constitute what may indeed be termed a 'judicial oligarchy.'"

On July 15, 1911, La Follette's Weekly Magazine published an editorial commending to its readers' approval, under the title "The usurped power of our courts," Allan L. Benson's "The usurped power of the courts," then commencing in Pearson's Magazine for August, 1911. The editorial appears to indorse Mr. Benson's charge that the Supreme Court "usurped" the power of judicial review, as well as his charge that the courts "are exercising despotic power."

On September 2, 1911, La Follette's Weekly Magazine published a further editorial commending to its readers the September number of Allan L. Benson's "The usurped power of the courts" in Pearson's Magazine.

On August 19, 1911, La Follette's Weekly Magazine published an article apparently approving Senator Robert L. Owen's speech criticizing the Supreme Court for having "unlawfully assumed the right to declare acts of Congress unconstitutional; * * * have overridden the rights of State laws in a similar manner."

The Socialist view of the Supreme Court of the United States is found in Gustavus Myers History of the Supreme Court of the United States (1912) Mr. Myers charges the Federal court of last resort with judicial usurpation in reviewing any laws (pp. 136, 137, 158-160, 225-227, 262, 263) as the foundation on which he charges servility (pp. 135-158, 167-194, 219-222, 283-354), and he also charges many of its deceased members with subserviency (pp. 170, 195-196, 204-217, 225-227, 242-243, 260-267, 269-274, 277, 281-282, 432-439, 471-479, 489-507, 509, 510, 514, 517-527, 529-576, 586-617, 624-636, 639-640, 645, 651-660, 703-715, 729-766, 770-779).

It is not surprising that those who, during and since the last presidential campaign, because they overlooked or ignored the history of the fourteenth amendment (Flack, *The Adoption of the Fourteenth Amendment*), were willing to criticize the elective State courts of last resort, and in one instance, some justices of the Supreme Court, as fossilized or reactionary for enforcing the fourteenth amendment, balked at indorsing a campaign based on the Socialistic platform and theory that the Supreme Court of the United States had from the beginning practised usurpation and judicial despotism, and that all or most American courts of last resort were "judicial oligarchies."

Your committee's first report shows that the principle of judicial review was deliberately included in the Federal Constitution, following the many precedents of the British privy council, as well as of Lord Chief Justices Coke, Hobart and Holt, upholding court review. (Report of Nov. 28, 1914, pp. 12-94.)

Gustavus Myers, the Socialist historian, asserts that the colonial justifications of the American Revolution, viz., that the stamp act was unconstitutional, because it levied a tax on British subjects in the thirteen colonies without their consent, also because it impaired the obligation of the colonial charters, were judicial usurpations of the colonial courts and lawyers, and were founded upon prior English judicial usurpations by Lord Chief Justices Coke, Hobart, Holt, and their associates. In short, leading Socialists base their platform attacks of 1912 upon the Supreme Court for alleged judicial usurpation (National Socialist platform, 1912; "Political demands") upon the theory that George III and Lord North were right in waging a civil war against the thirteen colonies in order to establish their claim of parliamentary absolutism over all British colonies, as well as over all British subjects, and that our ancestors were wrong in successfully resisting parliamentary absolutism in the American Revolution. Only the Tory historians of the American Revolution champion these Socialist claims for absolute legislative power by the Parliament of the parent State over thirteen other civilized States 3,000 miles away and separated by the Atlantic Ocean. No modern British, Australian, Canadian, or South African historian or statesman upholds this reactionary view.

Gustavus Myers History of the Supreme Court (1912) says (p. 133):

"But what especially aroused fears was the judiciary. During the Revo-

lution only one of the royal judges in Massachusetts, for example, had espoused the popular cause, and this particular one—Cushing—did not do so until he was virtually compelled to give an expression of opinion; he then became one of the most stalwart and timeserving of the band of reactionaries. During more than a century the judges had acted arrogantly and often corruptly; they had usurped powers never granted to them, and had assumed the right to void laws as much as they pleased."

And further (pp. 136, 137):

"The class seizing hold of the reins after the American Revolution had been won well knew that however that Revolution abolished certain forms and details, it did not touch something of far more enduring and incisive effect.

"The pillar left untouched was the long line of privileges and precedents established by a powerful feudal aristocracy and maintained by the courts since the reign of Richard II of England, and even before. These precedents had been established for the twofold purpose of justifying the maraudings, thefts, and summary frauds by which the dukes, lords and barons have appropriated the British soil, and with the object of holding the working class in complete subjection. They were principles of law enunciated by judges put on the bench by those selfsame pillagers; very often those judges were avowedly corrupt, like Lord Bacon, who admitted taking bribes. * * * The decisions of these judges were followed by the American colonial judges; and presently we find the Supreme Court of the United States, when in need of precedents, going back to Lord Coke, Lord Bacon, and such jurists."

And further (pp. 157, 158):

"To understand fully the serene confidence that the landholders and traders of the Revolutionary period had in the courts as the final and unchangeable bulwark of their interests, and what they expected from the judiciary, it is only necessary to point out that the courts during the Revolution put themselves above law. They usurped power when they willed, and construed law as they pleased. Wilson knew that many of their acts were sheer usurpations, for, in a pamphlet, he defended usurpation. When he caused that memorable clause of his to be inserted in the Constitution, he knew, also, that the usurpations already put in practice would serve as precedents to invite and justify further usurpations."

And further (pp. 158, 159):

"But the usurpations of the judiciary extended to the more serious and sinister length of annulling legislative acts.

"Court usurpation already established.

"This usurpation Shirley seeks to explain thus:

"In the dark days which preceded the Revolution," he says, 'the people of the colonies had been thoroughly indoctrinated with the idea that the acts of Parliament of which they complained were unconstitutional, and therefore void, and that in consequence they were justified in resisting their enforcement.

Judge Wilson, in a great pamphlet, had urged with great ingenuity and force that it was right and the duty of the courts to set aside those acts. This view was supported by many of the most eminent politicians, statesmen, and jurists of that day. This doctrine had sunk deep into the popular mind.'

"But it was not against acts of Parliament that the courts presumed to usurp this power. The unpopularity of the laws passed by Parliament supplied a very good pretext and justification for the assumption of a power directed not against Parliament, but against the mass of the people."

And further (p. 160):

"That this usurpation of power was exercised against the legislatures is admitted by Shirley in his next paragraph. 'The judges in Rhode Island,' he wrote, 'had set aside an act of the legislature as unconstitutional. The same is true of New Jersey. In 1788 and 1793 the court of appeals in Virginia had done the same thing. The power of the highest court to set aside such acts was recognized in New Hampshire soon after the adoption of the written constitution of 1784. From 1790 to 1799 they were repeatedly declared void by the highest court, and sometimes by inferior tribunals.'"

**II. ATTACKS ON JUDICIAL REVIEW DURING 1913-14, BASED ON UNWARRANTED
ASSERTIONS THAT THE MEMBERS OF THE FEDERAL CONVENTION OF 1787 WERE
NOT DISINTERESTED**

There remains to be considered the claim of some Socialist leaders of thought who, agreeing with Marx that "the key to" the Marxian "Socialist doctrine is the economic interpretation of history with the class-struggle doctrine following in its train" (see "Marxism versus Socialism," V. G. Simkhovitch, 23 Political Science Quarterly, 197, 212, 219, 654, 655), now assert that we have a "dishonest Constitution," representing the work of what "to-day would be called grafters" (Allan L. Benson's letter, p. 49) or "a group of grafters." (The chapter is headnoted 'Washington and his group;' Allan L. Benson's Our Dishonest Constitution, pp. 53, 5, 11, 18-20, 59, 91, 92.) Mr. Benson's letter neither cites nor quotes any original authorities, and he now only refers to alleged secondary or hearsay authorities cited or quoted in Our Dishonest Constitution, where he says (pp. 20, 21, etc.):

"To save patriotic gentlemen the trouble of calling me a liar and a black-guard, I will say that in writing this chapter I shall, with one exception, to which I shall call attention, confine my quotations to two books. Every statement of alleged fact about 'the fathers' may be found either in An Economic Interpretation of the Constitution of the United States, by Prof. Charles A. Beard, of Columbia University, or in [citing another book from which your committee are unable to draw any unfavorable inferences to the Constitution or to the motives of its framers]."

Of the 55 delegates who attended the Constitutional Convention Mr. Benson says that—

"Fourteen were land speculators. Twenty-four were money-lenders. Eleven were merchants, manufacturers, or shippers. Fifteen were slaveholders. Forty of the fifty-five owned public securities.

"Of these gentlemen Prof. Beard says:

"It can not be said therefore, that the members of the convention were 'disinterested.''" (Our Dishonest Constitution, 51.)

"Next came the gentlemen who had investments in public securities. They were really the largest toads in the puddle. They owned paper that had a face value of \$60,000,000. They had not paid \$60,000,000 for it, however. More than half of them had paid only one-sixth or one-twentieth of its face value. * * * But the gentlemen who bought the paper at low figures were good gamblers. * * * They were determined to try to bring about a new government under a new constitution—a government that would bring the paper to par.

"It seems safe to hazard a guess," says Prof. Beard (p. 35), 'that at least \$40,000,000 gain came to the holders of securities through the adoption of the Constitution and the sound financial system which it made possible.' (Our Dishonest Constitution, 16.) Also that Washington, at the time of his death, owned 'in Government securities \$6,246.' (Our Dishonest Constitution, 36.)"

Prof. Beard's *An Economic Interpretation of the Constitution of the United States* says (pp. 149, 150):

"The overwhelming majority of members, at least five-sixths, were immediately, directly, and personally interested in the outcome of their labors at Philadelphia and were to a greater or less extent economic beneficiaries from the adoption of the Constitution.

"1. Public security interests were extensively represented in the convention. Of the 55 members who attended no less than 40 appear on the records of the Treasury Department for sums varying from a few dollars up to more than \$100,000. * * *

"It is interesting to note that, with the exception of New York, and possibly Delaware, each State had one or more prominent representatives in the convention who held more than a negligible amount of securities, and who could therefore speak with feeling and authority on the question of providing in the new Constitution for the full discharge of the public debt."

And further (Beard, p. 151):

"It can not be said, therefore, that the members of the convention were 'disinterested.' On the contrary, we are forced to accept the profoundly significant conclusion that they knew through their personal experience in economic affairs the precise results which the new government that they were setting up was designed to attain."

Prof. Beard counts Washington as one of the 40 members of the convention who were he says, "directly and personally interested" by reason of his ownership of public securities. "He held \$6,246 worth of United States securities." (Beard, pp. 144, 145.)

Prof. Beard gives the foreign continental debt in 1789, including interest, as \$11,710,378.62; the domestic continental debt in 1789, including interest, as \$40,414,085.94. The State debts were years afterwards funded and paid at and as \$18,271,786.47. (Beard, p. 33; Dewey, *Financial History of the United States*, pp. 89, 90, 93.)

Prof. Beard "assumed that when a member of the convention appears upon the funding books of the new government he was a public creditor at the time of the convention." (Beard, p. 75.)

He also defends Elbridge Gerry against the charge that he voted for any motion in the convention to assume and pay the Continental paper money, and because its payment was not assumed (and was never paid) opposed the adoption of the Constitution. (Beard, p. 98.)

Prof. Beard asserts that 15 out of the 55 attending members of the Federal convention, viz., Abraham Baldwin (\$2,500); Gunning Bedford (\$400); John Blair (\$13,000); David Brearly (\$500); Jonathan Dayton (possibly \$82,000); Elbridge Gerry (yearly interest \$3,500); Nicholas Gilman (\$6,700); Nathaniel Gorham (large, but uncertain); John Langdon (possibly \$25,000); James McClurg (possibly \$2,500); Thomas Mifflin (possibly \$500); Robert Morris (a banker, as such largest holder of public securities in Convention); George Read (with his wife, \$13,500); Caleb Strong (\$16,000); George Washington (unpaid balance of his personal expenses as Commander in Chief, for which he received no salary; amount uncertain), are affirmatively shown by the records of the Treasury Department and of the original thirteen States to have either owned or held public securities, other than Continental paper money, in 1787. The total holdings of the attending members of the convention, if as assumed by Prof. Beard that they remained at the same amount, both at and after the convention, could not have exceeded \$750,000. (Beard, pp. 74-149.) Two-thirds of their holdings then must have been Continental securities; the remaining one-third State securities.

"If we leave out of account the foreign debt, it appears that some \$60,000,000 worth of potential paper lay in the hands of American citizens in the spring of 1787. (Beard, p. 34.)

"It seems safe to hazard a guess therefore that at least \$40,000,000 gain came to the holders of securities through the adoption of the Constitution and the sound financial system which it made possible. (Beard, p. 35.)"

The refusal of the Federal Constitutional Convention to assume any of the State debt, to assume or pay any of the Continental paper money which was repudiated, and to change or improve the status of the Continental debt, was the cause of much of the fractional opposition among the speculative holders of the repudiated Continental paper money, as well as of the State debts, to the adoption of the Federal Constitution.

Prof. Farrand says (*Framing of the Constitution*, pp. 141, 142):

"Several members of the convention, among them Gerry, argued strongly

for a positive injunction upon Congress to assume the State obligations, as a matter both of justice and of public policy. The objections to assumption were based mainly upon the fear of benefiting speculators rather than legitimate creditors. The question was referred to a committee of a member from each State, and it was finally compromised by providing that all debts should be "as valid against the United States under this Constitution as under the confederation." This left the matter in the same delightful uncertainty as before. Not long after this, Gerry announced his inability to accept the new Constitution in the form which it had taken, and he soon became openly hostile to it. This hostility was charged to his failure to accomplish the assumption of State debts, for he was said to have speculated heavily in this class of securities. * * * Gerry strenuously denied holding more than a very small amount of these securities. (To the same effect, pp. 176, 177.)"

The motions and debates in the Federal convention on the question of assuming State debts and paying the Continental debt fully sustain Prof. Farrand's views, and will be found in 2 Farrand, *Records of the Federal Convention*, pages 326-328, 355-356, 412-414.

See also II Bancroft, *History of the Constitution*, 145; I Tucker, *Constitution of the United States*, 482.

The Federal convention avoided committing itself as to any phase of the Continental debt, State debt, or Continental paper-money question. The credit of restoring the Nation's credit by funding, assuming, and paying the Continental and State debt, and the responsibility of the repudiation of the Continental paper money belongs to Alexander Hamilton, Washington, and the first three Congresses.

What gave par value to the Continental debt, except the Continental paper money which was repudiated, as well as to the State debts, was their assumption by act of Congress in 1790, and their funding between 1790 and 1794 after the adoption of the Federal Constitution. (Dewey, *Financial History of the United States*, 89-96; Alexander Hamilton, by W. G. Sumner, 144-161.)

In every great and some small European nations patriotic men, women, and executors and trustees of estates invest their savings, as well as the proceeds of the sales of undepreciated neutral securities in the war debt or neutrality debt of their respective nations, at less than the rate which such investment might bring in neutral countries. But for the foreign and domestic loans we negotiated, often at greatly depreciated rates, neither the American Revolution, the War of 1812, nor the Civil War could have been successfully maintained. Nor could Great Britain have upheld the liberty of itself, its colonies, and its allies against the French Revolution and Napoleon from 1793 to 1815 without war loans at a then high interest rate. The holders or assignees of a Revolutionary War loan or any other national war loan are not unpatriotic because of its depreciation; on the contrary, it is the patriots who invest in such loans. They are morally and equitably, as well as legally entitled

to its payment in full when the Revolution or other war succeeds and the nation with peace and independence has become prosperous beyond measure.

In 1787 there were but three incorporated banks in the thirteen States, viz., Bank of North America in Philadelphia, first chartered by Congress in 1781; Bank of New York, organized in 1784 and chartered by New York in 1791; and the Bank of Massachusetts, chartered in 1784. (Dewey, *Financial History of the United States*, 98; 1 Sumner, *History of Banking in United States*, 12-20.)

In 1787 there were no American trust companies or savings banks; there was no stock exchange in New York (the first Capital) and but few American corporations whose stock was marketable. Land (generally unimproved) and mortgages thereon were the best American slow investments. Commercial paper and public securities were the best liquid or quick investments.

Prof. Beard's condemnation of citizens, either of the ten bankless States, or else of the three States which had but one small bank apiece, as not "disinterested," because they invested part of their savings in declining public securities (Beard, 151), is as unwarranted as treating as unworthy or unethical a savings bank or trustee who successfully invested below par in 3½ per cent or 4 per cent New York City bonds or other gilt-edged 3½ or 4 per cent bonds during a bond market depression. No European investor will be condemned by history as unpatriotic because he invested at market rates in the war debt or neutrality debt of his nation during the present war or else later during the financial depression inevitably following the treaty of peace.

Mr. Benson's assertions that the Federal Constitution was or is "our dishonest Constitution;" that it was or is the work of what "to-day would be called grafters" or of "a group of grafters" are unwarranted. The cap which he puts on, as quoted in a previous paragraph, fits him well. To falsify historical facts, to vilify the founders of the Republic, and to endeavor to destroy the fundamental principle of American democracy well merits the epithets he applies to himself. The assurance to each individual that his person and the fruits of his honest labor will be protected by the courts against the assault of a temporary legislative majority is, as Mr. Taft well called it, "the ark of the covenant" for Americans. The Marxian Socialist doctrine of the economic interpretation of history, with the class struggle following in its train, is also unwarranted.

III. THE TWO SYSTEMS OF ENFORCING THE FUNDAMENTAL LAW IN FEDERATIONS ARE JUDICIAL REVIEW AND A FEDERAL COUNCIL WITH PLENARY OR ABSOLUTE POWER

The Australian, Canadian, New Zealand, South African, and British Privy Council way of settling the inevitable conflicts between the legislation of the British Empire and that of the Kingdom of Ireland, the dominions, Commonwealth, union, colonies, and dependencies of the British Empire, as well as of

enforcing the constitutional limitations in the nature of, though not technically called, a bill of rights, imposed upon all the legislatures of the British Empire, except the Imperial Parliament, by their respective charters or constitutions, appears in the many judicial decisions holding laws *ultra vires* throughout the British Empire. Under the name of *ultra vires* laws, when invalid, and *intra vires* laws when valid, the privy council, Dominion, Commonwealth, Union, and colonial courts refuse to execute what we would call unconstitutional laws quite as freely as does our Federal court of last resort.

The German way of settling such conflicts, except in a limited class of conflicts between imperial and State laws, is by the federal council, which, when supported by the Kaiser, has absolute and plenary power. (James, Federal Constitution of Germany, arts. 2 and 76.)

The German Federal Council was created during the war of 1870, following four years of absolutism in Prussia, three foreign wars, and seven years of blood and iron, whereby Prince Bismarck first gave the Prussian Kingdom the primacy of Germany, and later founded the German Empire. The blood and iron inception and absolutist and warlike tendency of Bismarck's creation are frankly avowed in his autobiography, as well as in his talks with his chief press agent and intimate friend, Herr Busch.

IV. AUSTRALIAN AND PRIVY COUNCIL DECISIONS HOLDING AUSTRALIAN COMMONWEALTH AND STATE LAWS *ULTRA VIRES*, PUBLISHED SINCE OR OTHERWISE, NOT CONTAINED IN YOUR COMMITTEE'S FIRST REPORT

1891. In *MacLeod v. Attorney General for New South Wales* (Appeal Cases, 1891, 455, 458, 459) a New South Wales act prohibiting bigamous marriages was held *ultra vires* as to marriages solemnized in the United States.

1912. In *Rex v. Smithers* (16 Commonwealth L. R., 100, 108-111, 116-119) it was held that a New South Wales law excluding undesirable citizens (Australian native-born convicts) was *ultra vires*.

1913. In *Attorney General for the Commonwealth of Australia v. Colonial Sugar Refining Co.* (17 Commonwealth L. R., 644, 648, 651, 654-656) the privy council held that a Commonwealth law purporting to authorize a Commonwealth royal commission to compel answers generally in relation to the intrastate sugar industry, or to order the production of documents in relation thereto, was *ultra vires* because within the sphere of the States.

1914. In *Waterhouse v. Deputy Federal Commissioner of the Land Tax* (17 Commonwealth L. R., 665, 670, 671, 672-679) it was held that a Commonwealth land tax assessment act declaring husband and wife to be joint owners for the purpose of taxation of land transferred by either in trust for the benefit of the other was *ultra vires* because taxing one person upon the property of another person.

1914. In the *Tramways* case (18 Commonwealth L. R., 54, 58, 65-67, 81-83, 85-87) it was held that so much of a Commonwealth act as purported

to take away from the high court the power to issue prohibition in respect of an award or order of the Commonwealth court of conciliation and arbitration was ultra vires.

V. PRIVY COUNCIL DECISIONS HOLDING LAWS ULTRA VIRES, PUBLISHED SINCE OR OTHERWISE NOT CONTAINED IN YOUR COMMITTEE'S FIRST REPORT

1884. In *Attorney General for Quebec v. Reed* (10 Appeal Cases, 141, 143-146) a Province of Quebec act imposing a duty of 10 cents upon every exhibit filed in court was held ultra vires because it was an indirect tax which only the Dominion could impose.

1885. In *Governor General Dominion v. The Four Provinces* (*Wheeler Confederation Law of Canada*, 144, 157, 158) a Dominion temperance law was held ultra vires.

1913. In *Attorney General for the Commonwealth of Australia v. Colonial Sugar Refining Co.* (Appeal Cases, 1914, 237, 248, 252, 254-257) a Commonwealth of Australia act purporting to authorize a Commonwealth royal commission to compel answers generally to questions in relation to the intrastate sugar industry, also to order the production of documents in relation thereto, was held ultra vires of the Commonwealth as invading the sphere of the States.

1913. In *Cotton v. Rex* (Appeal Cases, 1914, 176, 189-191, 195) a Province of Quebec succession duties act was held ultra vires of the Province because it imposed an indirect tax, which only the Dominion could impose.

1914. In *John Deere Plow Co. v. Wharton* (Appeal Cases, 1915, 330, 337-343) it was held that a British Columbia act requiring in effect that companies incorporated by the Dominion Parliament shall be licensed or registered under the provincial act as a condition of carrying on business in the Province or maintaining proceedings in its courts, was ultra vires.

1914. In *Attorney General for Alberta v. Attorney General for Canada* (Appeal Cases, 1915, 363, 368-370) it was held that an Alberta provincial act authorizing a provincial railway company to take and use the lands of a Dominion railway company in order to cross the Dominion railway's line was ultra vires.

1774. In *Campbell v. Hall* (1 Cowper, 204, 209-214) the King's legislative proclamation which purported to levy duties upon exports from the island of Grenada was held ultra vires.

1835. In *Cameron v. Kyte* (3 Knapp, Privy Council, 332, 339-347) a legislative proclamation of the governor of the colony of Berbice reducing the vendue masters' commission on the sales of estates from 5 per cent to 1½ per cent on the gross amount of the biddings was held ultra vires.

For generations the privy council held that the colonial legislatures had the same inherent power to punish summarily for contempt that the high court of parliament has. (1836, *Beaumont v. Barrett*, 1 Moore P. C., 59, 76-81.)

In 1842 it denied this power to the Newfoundland House of Assembly (*Kielley v. Carson*, 4 Moore P. C., 63, 84, 90-92); in 1858 it denied it to the Legislative Council of Van Dieman's Land (*Fenton v. Hampton*, 11 Moore P. C., 347, 396-397), and in 1866 it denied it to the Legislative Assembly of Dominica. (*Doyle v. Falconer*, L. R., 1 Privy Council, 329, 338-342.)

VI. NEW ZEALAND ULTRA VIRES DECISIONS

1914. In *Broad v. Rex* (33 New Zealand Rep., 1275, 1281-1286) a railway by-law prohibiting any vehicle or animal being driven over a railway crossing where a railroad crossed a public road, otherwise than at a walking pace was held ultra vires.

SOUTH AFRICA ULTRA VIRES DECISIONS

1914. In *Union Government v. Hill* (South African L. R., 1914, Appellate Division, 195, 200, 201) a regulation of the minister of agriculture prescribing the methods, periods, and times for disinfecting sheep or goats by dipping them in a tank was held ultra vires.

1913. In *Adendorp Municipality v. Meyers* (South African L. R., 1913, Cape Provincial Division, 103, 106, 107) a municipal by-law authorizing the municipality to demolish dilapidated buildings was held ultra vires.

1913. In *Oudtshoorn Municipality v. North* (South African L. R., 1913, Cape Provincial Division, 468, 472-475) a municipal by-law imposing charges in respect to additional removals of slop water was held ultra vires.

VII. THE GERMAN FEDERAL COUNCIL WITH PLENARY OR ABSOLUTE POWER

From 1862 to 1866 von Bismarck as prime minister and von Roon as minister of war governed Prussia despotically, enlarged the army, and collected the revenue against the will and without the consent of Parliament, and waged two aggressive foreign wars. After the defeat of Austria and the South German States in 1866, the Prussian Parliament granted an indemnity for von Bismarck and his associate ministers' unconstitutional acts. (V. von Sybel, *Founding of the German Empire*, 487-490.) By seven years of what Bismarck describes as his policy of "blood and iron" and three foreign wars, all of which he admits he brought about, in 1866 he gave Prussia the primacy of Germany, and in 1871, during the war with France, he founded the German Empire and gave Germany the primacy of Europe. In his autobiography he frankly admits that judicial action was the one and only thing that he and the King feared; that in 1862 when he was first appointed prime minister, the King of Prussia contemplated abdicating; that in 1866 and again in July, 1870 Bismarck contemplated resigning his office of prime minister; and in August, 1866, he contemplated throwing himself out of a window, but was dissuaded from so doing by the crown prince of Prussia, later the Kaiser Frederick.

I Bismarck, *The Man and the Statesman*, says (p. 312):

"Only the difficulties which in 1862 had brought the King to resolve on abdication, that were able so far to influence his mind and sound judgment as to help his monarchical views of 1859 across the bridge of the Danish question, to the point of view of 1866—i. e., from speaking to doing, from phrase to action."

And further (p. 313):

"Prussia * * * could no longer wear unaided on its long, narrow figure the panoply which Germany required for its security; it must be equally distributed over all German peoples.

"We should get no nearer the goal by speeches, associations, decisions of majorities, we should be unable to avoid a serious contest, a contest which could only be settled by blood and iron. In order to secure our success in this, the deputies must place the greater possible weight of blood and iron in the hands of the King of Prussia, in order that, according to his judgment, he might throw it into one scale or the other."

And further (p. 314):

"When I begged the [King of Prussia] for permission to narrate the events which had occurred during his absence, he interrupted me with the words: 'I can perfectly well see where all this will end. Over there in front of the opera house, under my windows, they will cut off your head, and mine a little while afterwards.'"

And further (pp. 314, 315):

"Your majesty must not think of Louis XVI; he lived and died in a condition of mental weakness, and does not present a heroic figure in history. Charles I, on the other hand, will always remain a noble historical character, for, after drawing his sword for his rights and losing the battle, he did not hesitate to confirm his royal intent with his blood. Your majesty is bound to fight; you can not capitulate; you must, even at the risk of bodily danger, go forth to meet any attempt at coercion."

And further (pp. 315, 316):

"This set him on a course of thought which was quite familiar to him; and in a few minutes he was restored to the confidence which he had lost at Baden, and even recovered his cheerfulness. To give up his life for King and fatherland was the duty of an officer; still more that of a King, as the first officer in the land. As soon as he regarded his position from the point of view of military honor, it had no more terror for him than the command to defend what might prove a desperate position would have for any ordinary Prussian officer."

And further (pp. 316, 317):

"Our situation was still sufficiently serious. Some progressive journals hoped to see me picking oakum for the benefit of the State; and on February 17, 1863, the House of Deputies declared, by 274 to 45, that the ministers were responsible with their persons and fortunes for unconstitutional expenditure. It was suggested to me that for the sake of securing my estate I should make it over to my brother. But the cession of my property to my brother

in order to avoid its confiscation, which might not have been impossible on a change of sovereign, would have given an impression of alarm and anxiety about money matters which were repugnant to me. Besides this, my seat in the upper house was attached to Kneiphof."

And further (pp. 331, 332):

"Roon, however, was the only one of my later colleagues who at my entrance upon office knew of its intended consequences and the common plan of operations, and discussed the latter with me. He was unequalled in the loyalty, staunchness, and resourcefulness with which, before and after my accession to power, he helped to surmount the crisis in which the State had been involved by the 'new era' experiment."

After Sadowa, when the victorious Prussian generals demanded severe terms of peace for the vanquished, Bismarck says (Bismarck, *The Man and Statesman*, Vol. II, pp. 52, 53):

"The resistance which I was obliged, in accordance with my conviction, to offer to the King's views with regard to following up the military successes, and to his inclination to continue the victorious advance, excited him to such a degree that a prolongation of the discussion became impossible; and, under the impression that my opinion was rejected, I left the room with the idea of begging the King to allow me, in my capacity of officer, to join my regiment. On returning to my room I was in the mood that the thought occurred to me whether it would not be better to fall out of the open window, which was four stories high; and I did not look around when I heard the door open, although I suspected that the person entering was the crown prince, whose room in the same corridor I had just passed. I felt his hand on my shoulder, whilst he said: 'You know that I was against this war. You considered it necessary, and the responsibility for it lies on you. If you are now persuaded that our end is attained and peace must now be concluded, I am ready to support you and defend your opinion with my father.' He then repaired to the King and came back after a short half hour, in the same calm, friendly mood, but with the words: 'It has been a very difficult business, but my father has consented.'"

And further (Vol. II, p. 77):

"I do not consider absolutism by any means a form of government that is desirable or successful in Germany in the long run. * * * The absolutism of the Crown is just as little tenable as the absolutism of parliamentary majorities; the necessity for the agreement of both in every alteration of the legal status quo is just, and we did not need to make any important improvement in the Prussian Constitution. Government can be carried on with it, and the course of German policy would have been littered up if we had altered it in 1866. Before the victory I would never have mentioned the word 'indemnity;' but after the victory the King was in a position to make the concession magnanimously, and to conclude peace, not with his people—for it was never interrupted, as the course of the war showed—but with the section of the oppo-

sition which had gone out of harmony with the Government, more from national than from party grounds. * * *

And further (Vol. II, pp. 77, 78):

"On August 4 I tried to combat the difficulties which his own views, but still more external influences, and especially the influence of the conservative deputation, had left on the King's mind. To this was added a view of political affairs which made His Majesty regard a request for a bill of indemnity as an admission of a wrong committed. * * * In all constitutional life, in the scope it allows to governments, it is a necessary condition that they can not always find indicated in the constitution a compulsory course for every situation.

And further (Vol. II, p. 79):

"At last, however, the King reluctantly assented to that also (a bill of indemnity), and thus it was possible to open the Diet on August 5 with a speech from the throne which announced that the representatives of the country were to proceed to an ex post facto approval of the administration carried on without an appropriation act."

Immediately before the deletion by Bismarck of certain words from the Ems telegram, the publication of which in the deleted form France regarded as the basis for a declaration of war, Bismarck says (Vol. II, pp. 96, 97):

"Having decided to resign, in spite of the remonstrances which Roon made against it, I invited him and Moltke to dine with me alone on the 13th, and communicated to them at table my views and projects for doing so. Both were greatly depressed, and reproached me indirectly with selfishly availing myself of my greater facility for withdrawing from service."

And further (Vol. II, p. 101):

"After I had read out the concentrated edition to my two guests, Moltke remarked: 'Now it has a different ring; it sounded before like a parley; now it is like a flourish in answer to a challenge.' I went on to explain: * * * 'It will be known in Paris before midnight, and not only on account of its contents, but also on account of the manner of its distribution, will have the effect of a red rag upon the Gallic bull. Fight we must if we do not want to act the part of the vanquished without a battle. Success, however, essentially depends upon the impression which the origination of the war makes upon us and others; it is important that we should be the ones attacked.' * * *

Herr Moritz Busch, in *II Bismarck, Some Secret Pages of His History*, says Prince Bismarck told him (Vol. II, pp. 164, 165):

"Thus on Sunday, the 21st of October [1877] while seated in the position I have already described, and after gazing for a while into space, he complained to us that he had had little pleasure or satisfaction from his political life. He had made no one happy thereby, neither himself, nor his family, nor others. We protested, but he continued as follows:

"There is no doubt, however, that I have caused unhappiness to great num-

bers. But for me three great wars would not have taken place, 80,000 men would not have been killed and would not now be mourned by parents, brothers, sisters, and widows.' 'And sweethearts,' I added, somewhat prosaically and inconsiderately. 'And sweethearts,' he repeated. 'I have settled that with God, however. But I have had little if any pleasure from all that I have done, while on the other hand I have had a great deal of worry, anxiety and trouble,' a theme upon which he then dwelt at some length.

"We kept silent, and I was greatly surprised. I afterwards heard from Holstein and Bucher that during the last few years he frequently expressed himself in a similar strain."

II Bismarck, the Man and the Statesman (p. 293):

"During the time that I was in office I advised three wars, the Danish, the Bohemian, and the French; but every time I have first made clear to myself whether the war, if it were successful, would bring a prize of victory worth the sacrifices which every war requires, and which now are so much greater than in the last century."

One of Senator La Follette's ablest lieutenants, Dr. Frederic C. Howe, in his book, *Wisconsin an Experiment in Democracy*, says (preface, p. vii):

"Wisconsin is doing for America what Germany is doing for the world."

Details of the German State socialism, as imitated in Wisconsin, are set forth at pages xi-xii, 38, 39, 49, 63, 113, 114, 117, 118, 131, 132, 140, 141.

Dr. Howe further says (p. 187):

"No constructive program can be developed in the midst of a class conflict. It can be achieved by a benevolent autocrat, as in Germany, or it can be achieved by democracy. There is no place for State building in the midst of a struggle between privilege and democracy."

Some of the advocates of a benevolent autocrat to institute a constructive program of State socialism overlook the fact that very much of the wonderful discipline, cooperation, industry, and efficiency of the German peasants, mechanics, and wage earners is the result not of autocracy or State socialism, but of the discipline and training produced by general military service in the German Army.

The German Empire by reason of its efficient organization, specialized and class education and discipline, all under the skilled direction of an autocracy, with nearly every German peasant and most German wage earners educated by service in the German Army or Navy (as it is thought by many) to greater trade, business, and commercial efficiency than our high schools educate their average graduate, is probably the most efficient Government in the world. Yet the Anglo-Saxon "theory of our Government, State and National, is opposed to the deposit of unlimited power anywhere" (Loan Association v. Topeka, 20 Wall., 663), and it wisely sacrifices autocratic and militaristic efficiency in order to conserve our still more valuable birthright of individual liberty and personal freedom. In the long run individual liberty and personal freedom

conserves the greatest good of the greatest number much more than autocracy, no matter how efficient it may be, can do. Of this the present bloody war in Europe is a notable example.

Your committee's first report (approved by the association at the January, 1915, annual meeting) was sent to the socialistic and usurpationist leaders of thought and action, also to the editors of the leading magazines and periodicals which in 1911 and 1912 asserted that judicial review was a judicial usurpation.

No answer to our report has yet been received or read by your committee from any of them, but your committee is not advised and finds no evidence that the socialists and usurpationists intend to abandon the charge of judicial usurpation contained in the Socialist platform of 1912. They probably will reassert it during the campaign of 1916.

In the summer of 1914 a number of socialists and usurpationists advised members of your committee that they would answer any report not in accord with their views. So far as your committee is advised, however, none of them have yet done so. Since January, 1915, a few newspaper articles inferentially (and one directly) asserting usurpation as an established fact, but not attempting to prove it, are all we can find.

Your committee's first report was sent to the leaders of thought and action, as well as to the editors of many of the leading magazines and periodicals advocating the view of Mr. Holder, of South Australia, that the constitutional decisions of every State court should be subject to review by a plebiscite of the voters of such State, notwithstanding the Federal Constitution, and particularly the fourteenth and fifteenth amendments thereof. No answer to the report has been received or read by your committee from any of the recall propagandists. The western agitation for the recall of decisions still continues with an aggressive propaganda behind it.

In August, 1915, there was signed, and on September 28, 1915, your committee received the printed final report of the (Federal) Commission on Industrial relations. The portion of the minority report of Chairman Frank P. Walsh and Commissioners Garretson, Lennon, and O'Connell relating to judicial review is printed as Exhibit A, and is hereto annexed.

Questionnaires (in form annexed) were sent to Allan L. Benson, Gustavus Myers, Prof. Beard, also to several radical propagandists of usurpationist or benevolent autocratic views. Some curious answers thereto, showing the difference in tone of these propagandists between 1912 and 1915, are annexed and marked "Exhibits B, C, and D."

VIII. NEW NATIONALISM AND JUDICIAL REVIEW OF LAWS

New nationalism's attitude toward judicial review of the validity of laws in a federation is merely one of destructive criticism; it suggests no other prac-

tical way of settling conflicts between fundamental law and statute law. It regards judicial review of laws either as an assumed power which sprang full armed from the brain of Chief Justice Marshall (Theodore Roosevelt, "Nationalism and the judiciary," Outlook, Mar. 4, 1911, pp. 490, 491), or else as a unique and archaic local Americanism. (Theodore Roosevelt, "Judges and progress," Outlook, Jan. 6, 1912, p. 41; "Criticism of the courts," Outlook, Sept. 24, 1910, p. 149.) It denies the democratic-republican idea of Thomas Jefferson and his associates that the right of the individual to life, liberty, and pursuit of happiness is sacred. This conception was incorporated into the Federal Constitution by the first ten amendments thereto. This new nationalism denies the view of Washington, Hamilton, and their school, that the individual citizen should be protected in the enjoyment both of life and property from the despotic power of a temporary legislative majority. Such protection was incorporated by a later generation into the fourteenth amendment to the Federal Constitution. Boldly, directly, and frankly does new nationalism attack the fourteenth amendment (Theodore Roosevelt, "The right of the people to rule," Outlook, Mar. 23, 1912, pp. 619, 620, 623-625), as well as the theory of the Jeffersonians and Federalists as to what constituted liberty and free government. (Theodore Roosevelt, *The New Nationalism*, pp. 40-42; "Judges and progress," Outlook, Jan. 6, 1912, pp. 43-45; "The right of the people to rule," Outlook, Mar. 23, 1912, pp. 620-625; "Criticism of the courts," Outlook, Sept. 24, 1910, pp. 150-152.)

The great rival of this American principle has been and is the German imperial autocracy, enforced by a Federal council with plenary power, tempered with State socialism, and stiffened by general military or naval service in the German Army or Navy, that has prevailed in Germany since 1871.

While many advocates of new nationalism approve German autocracy, your committee can not find any who even mention the German Federal council with its plenary, autocratic, and dictatorial powers. Advocates of new nationalism sometimes urge State plebiscites on State court constitutional decisions. (Theodore Roosevelt, "A charter of democracy," Outlook, Feb. 24, 1912, pp. 398-401; "Judges and progress," Outlook, Jan. 6, 1912, pp. 45-48.) In so doing they ignore the fourteenth amendment to the Federal Constitution, as well as the bill of rights in the original Federal Constitution, and the duty of the Federal courts to enforce both. They also ignore the fact that their nostrum is copied from a scheme for Commonwealth plebiscites upon Commonwealth constitutional decisions proposed in the Australasian Federal convention of 1898, which was withdrawn because its proposer could find no seconder.

Their attacks upon the due process of law clause of the fourteenth amendment, as well as their demands for its repeal (Dean H. W. Ballentine, *Labor Legislation and the Recall of the Judicial Veto*, 19 Case and Comment, 225-230) ignore the facts that the Federal Supreme Court (*Guinn v. United States*, 238 U. S., 347, 363, point raised in J. H. Adriaans *amicus curia* brief) refused to

abrogate the fourteenth amendment, and that in 1911 the electors of Australia defeated a proposed constitutional amendment to give the Commonwealth parliament plenary power to pass laws in relation to labor, employment, wages, and conditions of labor.

New nationalists who assert that the Jeffersonian theory that the best republican government was the one which governed the least, as well as the laissez faire theory of Hamilton, Washington, and the English, American, and French political economists from Adam Smith to Herbert Spencer, has been outgrown, have the burden of proving their assertions favoring German autocracy, state socialism, or a plebiscitary consolidated democracy. So far as this Federal democratic Republic is concerned they have wholly failed to prove their charges. Epithets, adjectives, and denunciations of our constitutional system that has since 1787 brought the greatest good to the greatest number of any constitutional system yet known, are not proof. More efficiency we do need; autocracy we abhor.

IX. CONCLUSION

Our ancestors did not fight eight years to defeat unconstitutional parliamentary absolutism because the British Parliament had no constitutional right to tax the colonies 3 pence a pound upon tea, only to create in lieu thereof a consolidated congressional absolutism, plus forty-eight State legislative absolutisms, without any Federal council as in the German Empire, to either settle the inevitable conflicts between State and Federal jurisdiction, or to enforce the bill of rights incorporated in the Federal Constitution and in its first ten amendments as limitations upon Congress and the Federal Government, or to enforce the further bill of rights incorporated in the Federal Constitution and in its thirteenth, fourteenth, and fifteenth amendments as limitations upon the State legislatures and State governments.

Even in Australia the socialist and labor parties' proposal to amend the constitution of Australia by conferring upon the Commonwealth parliament plenary and absolute power to make laws with respect to labor and employment, including the wages and conditions of labor and employment in any trade, industry, or calling (Commonwealth Acts, Australia, vol. 9, 1910, pp. 117-118), was disapproved by the electors of Australia on a referendum vote on April 26, 1911. (Commonwealth Acts, 1901-1911, indexes, vol. 2, p. 951.)

This committee therefore respectfully presents the following resolutions.

HENRY A. FORSTER.
EVERETT P. WHEELER.
CHARLES H. BECKETT.
FREDERICK D. COLSON.
EVERETT V. ABBOT.

November 6, 1915.

Resolved, That any contention that the Supreme Court of the United States in enforcing the Federal Constitution has usurped the power to pass

upon the constitutionality of the legislation enacted by Congress, is contrary to both the letter and the spirit of the Federal Constitution; is unwarranted by the history of the United States, and by the history of federations possessing a written fundamental law, but without any Federal council with plenary powers to determine conflicts between the fundamental law and ordinary statutes, and it is also contrary to the spirit of our Federal democratic Republic with forty-nine legislative units (one federation and forty-eight-states).

"Resolved further, That the theory of our Governments, State and National is opposed to the deposit of unlimited power anywhere."

I hereby certify that the two foregoing resolutions were duly adopted by the New York State Bar Association at its thirty-ninth annual meeting on January 15, 1916.

FREDERICK E. WADHAMS,
Secretary.

THIRD REPORT OF THE COMMITTEE UPON THE DUTY OF COURTS TO REFUSE TO EXECUTE STATUTES IN CONTRAVENTION OF THE FUNDAMENTAL LAW

To the New York State Bar Association:

The undersigned, the special committee upon the duty of courts to refuse to execute statutes in excess of or in contravention of the fundamental law, respectfully report as follows:

Following the approval of the resolutions accompanying your committee's second report and the printing of said second report and resolutions as Senate Document 454, Sixty-fourth Congress, first Session, presented by Senator O'Gorman, a large number of copies of such report were distributed to other bar associations, to the press, to the various press associations, to the magazines, to many law reformers, to some public libraries, to many law school libraries, university libraries, and college libraries throughout the Nation.

The only article discussing or answering either report that has been found by or reported to your committee is James M. Kerr's "Recall of Judges and Judicial Independence" (50 American Law Review, 481-505).

The National political party which from 1912 to 1914 advocated the recall of judicial decisions has ceased to advocate the recall of decisions.

The Socialist platform for 1916 demanded:

"POLITICAL DEMANDS

* * * * *

"8. The abolition of the power usurped by the Supreme Court of the United States to pass upon the constitutionality of legislation enacted by Congress. National laws to be repealed only by act of Congress or by a referendum vote of the whole people."

Many usurpationists apostles, disciples and propagandists have advocated a statute requiring judicial unanimity or all but unanimity before the courts may give precedence to the constitution over a conflicting statute, or else they advocate the judicial recall with the avowed object of thereby preventing state judges from enforcing the constitution in lieu of propagating further charges assumed power or of judicial usurpation.

I. Judicial review is a world wide practice in federations.

Judicial review of the validity of laws is as much a world wide practice in federations as is the ratio at which gold and silver should be coined. Its only rival in federations is the German system of a federal council (state Government appointed without the voters of either the states or the Empire having any voice in the matter) which, when in accord with the Kaiser, has plenary or dictatorial powers. Madison, Washington and Hamilton, with the support of the Virginia School, tried their best to incorporate a federal council or council of revision into our federal constitution, but they were defeated by Massachusetts and the more democratic states. Then the fathers resorted to judicial review (1 Farrand Records of the Federal Convention, 97-8, 107-114, 131, 138-141; 2 Farrand, 73-80, 298; Madison's letter to Jefferson of Oct. 24, 1787, enclosing copy of the Constitution, 3 Farrand, 133-5; Madison's Speech on Amendments to the Constitution, 5 Madison's Works, 380-381, 385; Madison's letter to N. P. Trist of Dec., 1831, 3 Farrand, 516; Madison's letter to W. C. Rives of Oct. 21, 1833, quoting Jefferson's view, 3 Farrand, 522-4; Jefferson to Madison, 5 Jefferson's Works (Ford ed.), 80-1; 4 Jefferson's Works, 476-7; 5 Jefferson's Works, 5, 45-7; Jefferson to Hopkinson, 5 Jefferson's Works, 76-7 Alexander Hamilton, The Federalist, 9 Hamilton's Works, 484-6).

The framers' resort to judicial review upon the loss of the Virginia project of a federal council followed the practice of the Privy Council in holding Colonial laws *ultra vires*, as well as the practice of the King's Bench down to the American Revolution, in holding Acts of Parliament contrary to Magna Charta, against common right, or in violation of the natural liberties of Englishmen, to be void (First Report, pp. 15-46; Second Report, pp. 22-6).

Bismarck after seven years of blood and iron and three aggressive foreign wars of conquest, all of which he avows bringing about, forced into the German Imperial Constitution a federal council, which when in accord with the Kaiser has plenary or dictatorial powers, in lieu of judicial review, which he above all things disapproved (Second Report, pp. 26-32).

Except the British Parliament, which because it is also the High Court of Parliament and the highest court in the United Kingdom, has not been (since 1776) subject to review by any other judicial body, every other Legislature in the British Empire is subject to judicial review (McIlwain, High Court of Parliament, 54-65, 307-310).

Recently on appeal from Canada alone, the Privy Council has held *ultra vires* a Sunday law (Atty. Genl. for Ontario v. Hamilton Street Ry Co., Appeal

Cases [1903], 524, 528-529); two Temperance laws (Atty. General for Ontario v. Atty. Genl. for the Dominion, Appeal Cases [1896], 348, 366-7, 371; Wheeler, Confederation Law of Canada, 144, 157-8); a Free Education law (Brophy v. Atty. General of Manitoba, Appeal Cases [1895], 202, 217, 226-8); a Uniform Marriage Law (Re Marriage Legislation in Canada, Appeal Cases [1912], 880, 886-7); an Anti Chinese Labor law (Union Colliery Co. v. Bryden, Appeal Cases [1899], 580, 587-8); a Succession (Transfer or Inheritance) Tax law (Cotton v. Rex, Appeal Cases [1914], 176, 189-91, 195); a Provincial Act directing the proceeds of the sale of the bonds of an insolvent railroad, which bonds the Province had guaranteed, to be paid over to the Treasurer of the Province to form part of the general revenue fund of the Province free and clear of any claim by the railway company, its successors or assigns (Royal Bank of Canada v. Rex, Appeal Cases [1913], 283, 289-98); a Provincial act requiring in effect that companies incorporated by the Dominion shall be licensed or registered under the Provincial Act as a condition of carrying on business in the Province or maintaining proceedings in its courts (John Deere Plow Co. v. Wharton, Appeal Cases [1915], 330, 337-43), and a Provincial Act authorizing a Provincial Railway Company to take and use the lands of a Dominion Railway Company in order to cross the Dominion railway's line (Atty. Genl. for Alberta v. Atty. Genl. for Canada, Appeal Cases [1915], 363, 368-70).

In or upon appeal from Australia, the Privy Council or the High Court of Australia recently held *ultra vires* a New South Wales Act prohibiting bigamous marriages as to marriages solemnized in the United States (MacLeod v. Atty. Genl. for New South Wales, Appeal Cases [1891], 455, 458-9); a Commonwealth of Australia Act purporting to authorize a Commonwealth Royal Commission to compel answers to questions relating to the intra state sugar industry (Atty. Genl. for the Commonwealth v. Colonial Sugar Ref. Co., Appeal Cases [1914], 237, 248, 252, 254-7); a New South Wales law excluding undesirable citizens (Rex v. Smithers, 16 Commonwealth L. R., 100, 108-111, 116-119); a Land Tax law declaring both husband and wife liable to taxation as joint owners upon the land transferred by either in trust for the benefit of the other (Waterhouse v. Deputy Federal Commissioner of Land Tax, 17 Commonwealth L. R., 665, 670-1, 672-9); a State Income Tax law upon the salary of a federal officer (Baxter v. Commissioners of Taxation, 4 Commonwealth L. R., part II, 1087, 1110-9, 1125-1133; appeal refused, Appeal Cases [1908], 214); a State Stamp tax upon a Federal Officer's salary (D'Emden v. Peddler, 1 Commonwealth L. R., 91); a State discriminating license fee law favoring domestic winegrowers over the winegrowers of other states (Fox v. Robbins, 8 Commonwealth L. R., 116, 120-132); also many labor laws and awards of conciliation courts (Young v. Tockassie, 2 Commonwealth L. R., 470, 475-8; King v. Barger, 6 Commonwealth L. R., 42, 63-5, 74-80; Atty. General for N. S. W. v. Brewery Employees' Union, 6 Commonwealth L. R., 470; Federated Amalgamated Government Railway & Tramway Service Assn. v. New South

Wales Railway Traffic Employees' Assn., 4 Commonwealth L. R., 489, 539, 545-7; Australian Boot Trade Employees' Federation v. Whybrow, 11 Commonwealth L. R., 311; The Tramways Case, 18 Commonwealth L. R., 55).

In the Australasian Federal Convention of 1898, Mr. Holder of South Australia, the originator of the proposal for the recall of Commonwealth High Court *ultra vires* judicial decisions, by the action of the executive, upon a majority vote of each house of the legislature, if ratified by a plebiscite of the electors, could find no seconder or supporter (II Official Record of the Debates of the Australasian Federal Convention [Melbourne, 1898], 1717-1721, 1723-32, Moore Constitution of the Commonwealth, 2 ed., 360-1).

On April 26, 1911, the electors of Australia rejected a referendum proposing to amend the Constitution of Australia by conferring upon the Commonwealth Parliament plenary and absolute power to make laws with respect to labor and employment, including the wages and condition of labor and employment in any trade, industry or calling (Commonwealth Acts, Australia, Vol. 9, 1910, pp. 117-8; Commonwealth Acts, 1901-1911, Indexes, Vol. 2, p. 951).

On appeal from South Africa the Privy Council held *ultra vires* a legislative proclamation of the Governor of Cape Colony directing the arrest and imprisonment at the Governor's pleasure, of a native chief untried and unheard (Sprigg v. Sigcau, Appeal Cases [1897], 238, 246-8).

II. Recent *ultra vires* decisions in other countries published since last report.

Privy Council.

1916. In Bonanza Creek Gold Mining Co., Ltd., v. Rex (Appeal Cases [1916], 566, 583), it was held that it was beyond the powers of the Ontario Provincial Legislature to repeal a United Provinces of Canada Act of 1864 except as to matters relating to Ontario alone.

1916. In Atty. General for Canada v. Atty. General for Alberta (Appeal Cases [1916], 588, 594-7), it was held that a Dominion Act forbidding unlicensed domestic insurance companies or Canadian underwriters from carrying on the insurance business within provinces was *ultra vires* as invading the sphere of the provinces.

1916. In Atty. General for Ontario v. Atty. General for Canada (Appeal Cases [1916], 598, 601-2), the two last above cited cases were approved and followed.

Australia.

1915. In State of New South Wales v. Commonwealth (20 Commonwealth L. R., 54, 59-65, 82, 93-5, 106, 107-110), it was held that a Commonwealth Act constituting the Inter State Commission of three members as and for a court of record, was *ultra vires*.

South Africa.

1914. In Rex v. Williams (South African L. R. [1914], Appellate Division 460, 463-70), it was held that a Cape of Good Hope Provincial Council ordinance

prohibiting bookmaking or betting on horse races except by means of a totalisator, was *ultra vires*.

1914. In *Williams v. Johannesburg Municipality* ([1915] South African L. R., Transvaal Provincial Division, 106, 115-7, 122-3, 125-7), a municipal by law prohibiting negroes or Asiatics from using trolley cars set apart for the use of white passengers was held *ultra vires*.

III. Jealousy of judicial independence is the genesis of the practice for the autocratic recall and punishment of independent European judges by the executive, as well as for the arbitrary recall of elective state judges by plebiscite. This tendency is strongest in militaristic autocracies.

In ex-Senator Root's Address to this Association on January 15, 1916, he says in part (Yearbook for 1916, p. 478; italics ours):

"The *millions of immigrants* who have come *from the Continent* of Europe have come from communities which have not the traditions of individual liberty, but the traditions of State control over liberty; they *have come from communities in which the courts are part of the administrative system* of the government, *not independent tribunals* to do justice between the individual and the government; * * *

In England the law reports show that during the reign of James II, the last Stuart, even that home of European freedom had judges who in their decisions publicly acknowledged their servility. The Revolution of 1688 overthrew judicial servility by substituting judicial tenure during good behavior for judicial tenure at the King's pleasure, restored liberty and established judicial independence.

Gooden v. Hales (2 Shower, 475, 478):

"The Lord Chief Justice took time to consider of it, and spake with the other judges, and three or four days after, declared that he and all the judges (except Street and Powell, Justices, who doubted) were of opinion, that the Kings of England were absolute sovereigns; that the laws were the king's laws; that the king had a power to dispense with any of the laws of government as he saw necessity for it; that he was sole judge of that necessity; that no act of parliament could take away that power; * * *."

Since the French Constitutions of 1791, 1793 and 1795 prohibited French Courts from reviewing the validity of Acts of Parliament, "both the administrative and judicial courts exhibited a deplorable subserviency toward the government" under both Empires (James W. Garner, 9 American Political Science Review, 655-664). The Dreyfus case is a sample of how servile two French Court Martials were in 1894 and 1899. Yet during the third Republic the Council of State and the Cour de Cassation have freely exercised judicial review over ordinances of public administration, delegated authority under Acts of Parliament, official acts of the President, the Ministers, Commissions, Prefects and Mayors. Only acts of Parliament *per se* have not yet been reviewed (Judicial Control of Administrative and Legislative Acts in France, James W. Garner, 9 American Political Science Review, 637-665).

Spain, the first modern European world power, was formed by the Union of Castile and Aragon in 1479. Until 1591 the *fueros* or liberties of Aragon were preserved by an elaborate system of judicial review whereby the Justiza or constitutional guardian of public liberty could and did declare any act of government unlawful as contrary to the *fueros* or liberties of Aragon.

1 Prescott, Reign of Charles V, 143-5, 260-5.

1 Robertson, History of Charles V (1769 ed.), 152-4, 338-347.

1 Lea, Inquisition of Spain, 229, 450-2.

In 1591 Philip II invaded Aragon with a Castilian Army composed of 15,000 of Alva's veterans under Don Alonzo de Vargas because the Aragonese refused to permit Perez, his former secretary, to be tortured and tried contrary to the *fueros* of Aragon; Perez escaped; Alva's veterans executed Justiza Lanuza. Thus by a headsman, a block and an axe the autocratic king alike recalled the Justiza, his decision and *fueros* or liberties of Aragon.

4 Lea, Inquisition of Spain, 260-6, 269-70.

3 Cambridge Modern History, 513-517.

In 1779 Frederick the Great of Prussia recalled a decision in favor of von Geradorf as landlord against a miller named Arnold as tenant, after it had been affirmed by the then highest court of Prussia; dismissed Chancellor von Furst, he also dismissed Rathes (or judges) Rannleben, Friedel and Graum; imprisoned the Rathes, first in the Town prison, later for one year in the fortress of Spandau, and he finally compelled the Rathes to make restitution to Arnold for his alleged damages by paying a fine amounting to over 1,358 thalers, £203 14s.

After Frederick's death his successor had the case reopened before a Court of Appeal, which advised the reinstatement of the recalled judgment. King Frederick Wilhelm II then reinstated the recalled Rathes and paid them out of his privy purse the fine they had been unjustly compelled to pay to Arnold. The Chancellor was not reinstated. Arnold seems to have gone scot free, though his landlord's legal rights were re-established in the land. (10 Carlyle, Frederick the Great, Book 21, chapter 7). While the friends of the reinstated Rathes may have regarded their reappointment as a rehabilitation and vindication, the transaction has also the earmarks of a free pardon for their *less majesté* in not anticipating the royal will and pleasure.

1 Treitschke, History of Germany in the 19th Century (McBride, Nast & Co.), says (p. 89):

"There was a promise of the unconditional independence of the courts *vis à vis* the administration, and such independence was in practice secured except as regards a few instances of judicial power arbitrarily but benevolently exercised by the royal cabinet. The new judiciary, though not very highly paid, preserved an honorable sense of its duties; and whilst the courts of the empire" (the predominant partner in which was Austria) "displayed venality and partisanship, in Prussia the proud saying was justified (even against the King's will) *il y a des juges à Berlin*."

Treitschke's *Life of Frederick the Great* (G. P. Putnam's Sons) says (p. 187):

"The absolute independence of the courts of justice in relation to the Administration was solemnly promised, and kept inviolably, with the exception of a few cases of well meaning despotic high-handed justice. The new Bench preserved in a modest domestic position an honorable class feeling, and while the Imperial courts" (Austria was then the predominant partner in the Empire) "were full of corruption, the proud saying was coined in Prussia, and that against the King: *Il y a des juges à Berlin.*"

In 1897 the High Court of the South African Republic held the Grondwet to be the fundamental law of that Republic, which it was its duty to enforce against statutes in contravention thereof (Brown v. Leyds, 4 Official Reports, High Court, South African Republic, 17-54; 14 Cape Law Journal, 71-3, 94-109). President Krueger and the war party in the Volksraad by threatening to cashier the sitting judges and appoint in their places creatures of the war party, succeeded in overthrowing the independence of the High Court and forcing it to abandon its right and duty to uphold the Grondwet (14 Cape Law Journal, 109-117). The ultimatum to Great Britain followed and the Transvaal and Orange Free State ceased to be Republics.

In much of Continental Europe to-day, the executive no more hesitates to discipline a judge who refuses to bend to his will, than did Philip II of Spain or Frederick the Great of Prussia.

In 1913 the Finnish High Court of Viborg refused to execute an act of the Russian Duma conferring equal rights upon both Russians and Finns within Finland, because it had not been passed by the Finnish Senate. The entire High Court was imprisoned for eight months in the Kresty prison at Petrograd to force them to recall their decision. Being sustained by the Finns, however, they bore the imprisonment without recalling their decision, and happily made a precedent in favor of judicial review as well as of judicial independence (First Report, p. 47; New York Times, May 25, 1914).

In 1866 and 1867 nine elective state court judges were arrested for refusing to enforce part or all of the first civil rights bill of 1866 (Flack, *Adoption of 14th Amendment*, 50-1).

Wherever militarism results in autocracy, whether temporary as in a dictatorship, or permanent as in a military absolutism, the laws are silent, at the dictator's pleasure. In short, dictatorship operates to suspend all laws and substitutes therefor the will of the dictator.

In 1776 and again in 1777 Congress granted dictatorial powers to George Washington (Upton's *Military Policy of the United States*, 23-4, 30).

James Ford Rhodes says that during the Civil War President Lincoln "wielded more authority than any single Englishman has done since Oliver Cromwell" (4 Rhodes, *History of the U. S.*, 234-41). The courts were silent until after the war (4 Rhodes, 248-54; 6 Rhodes, 258-70).

The Continental European way of enforcing autocracy or arbitrary power

in time of peace, is by granting to the police legislative power to promulgate ordinances and police regulations within their local jurisdictions, as well as judicial power to punish the alleged violators of those ordinances (Fosdick's *European Police Systems*, 24-7, 29-30, 33). Mr. Fosdick says that in Germany and Austria the police promulgate ordinances for the territory within their local jurisdictions; that in Germany a chief of police punishes the alleged ordinance violators by not exceeding fourteen days' imprisonment or by not exceeding 60 marks fine (pp. 26, 29), generally upon merely reading his subordinate police officer's report of an alleged violation, without evidence, notice, hearing or trial (pp. 30-1, 78). Misdemeanants convicted and sentenced *ex parte* by the police in Germany may appeal to the County Court within a week after notice of the *ex parte* conviction and sentence, if not, the sentence becomes absolute (pp. 32-3). Appeals rarely succeed, except upon legal questions, because German Chiefs of Police, Police Lieutenants and County Judges, alike absolutely rely upon the policeman's word (p. 33).

In Austria there is usually an opportunity for the accused misdemeanant to make a statement or call witnesses before a Police Kommissar or bureau head, who may impose not to exceed 14 days' imprisonment or 200 kronen fine; there is no court of review as in Germany, but only an appeal to the imperial governor of the Province (pp. 33-4).

Mr. Fosdick says that there are several times as many punishments for misdemeanor in German cities as in English cities (pp. 35-36), and he quotes a German County Court Judge as saying "A German citizen who has not had at least one such punishment must be looked for with a lantern" (p. 36). In German cities police records are secret and police reports are not published for years at a time (p. 77).

IV. Attempts to recall or censure judges for enforcing the fundamental law have been made by State Legislatures, also by State Legislators, Governors and a plurality of the voters.

1784. New York. After the Mayor's Court of the City of New York in *Rutgers v. Waddington*, had refused to execute a State Statute authorizing actions of trespass by the owners of houses against the occupants thereof under orders of the British commander in chief, the Assembly by a vote of 25 to 15 censured the judges therefor (*Rutgers v. Waddington*, 1 *Thayer's Cases on Constitutional Law*, 63, 72-73).

1786. Rhode Island. After the Superior Court of Rhode Island, in *Trevett v. Weeden*, had refused to execute the State acts of 1786 imposing penalties upon all who refused to accept or take state paper legal tender bills of credit at par in payment for goods offered for sale, or who made or quoted any difference in price between such paper money and gold or silver, the paper money governor convened the legislature to impeach or dismiss the judges; the paper money majority in the legislature refused to impeach or dismiss the judges but censured them for their decision and refused to re-elect them when

their terms expired at the end of the year (Cooley, *Constitutional Limitations*, 7th ed., 229, note; *Trevett v. Weeden*, 1 *Thayer's Cases on Constitutional Law*, 73, 77-8; 2 *Chandler, Criminal Trials*, 269, 326-350).

1808-9. Ohio. After three judges of the Court of Common Pleas had refused to execute the State act of 1805 practically abolishing trial by jury in cases between \$20 and \$50 by conferring such jurisdiction upon justices of the peace, articles of impeachment were reported against Judges Pease and Tod, but not against Judge Huntingdon, who had meanwhile been elected governor. Both Judges Pease and Tod were acquitted, but the vote on one count as to Pease was 15 for conviction and 9 for acquittal (1 Chase, *Statutes of Ohio* [1833], 38-40; Cooley, *Constitutional Limitations*, 7th ed., 229-230, note).

In 1854 Joseph R. Swan, a founder of the Republican party, was nominated by his party and was elected Judge of the Supreme Court of Ohio by nearly 80,000 majority. In 1859, during the last year of his five-year term, he had become Chief Justice. As such he delivered the opinion of the court and gave the casting vote against over-riding the federal constitution and nullifying the fugitive slave law and refused to discharge on *habeas corpus* a prisoner who had been convicted and sentenced by the United States District Court for a violation of the fugitive slave law (*Ex parte Bushnell*, 9 *Ohio State*, 77, 181-199). Because of this decision he was defeated as a candidate for renomination and Judge Gholson was nominated by the Republicans, and elected in his stead (5 *Ohio State Bar Association Yearbook* [1884], pp. 54-55; 42 *Ohio State*, pp. VI-VII; *Memorials of Ch. J. Swan*).

Warden's Life of Chase says (pp. 357-8):

"But the great objection to such agitation was (I considered) that it attempted to direct, or to overawe, judicial action. It was soon followed by the political beheading of Judge Swan, of the Supreme Court of Ohio, on account of his judicially pronouncing an opinion, following the settled doctrine of the courts, on the subject of the legislation by Congress under the constitutional provisions for the extradition of fugitives from service."

1822-1829. Kentucky.

In 1817-1820, mostly preceding the panic of 1819, Kentucky enacted relief laws for debtors by statutes extending replevins for two years unless the creditor would endorse on his execution a consent to take notes of the Bank of Kentucky or the Bank of the Commonwealth. The capital of the former bank was inadequate and its notes were depreciated. The latter bank had neither capital nor a guaranty of State credit. In 1822 Circuit Judge Clark declared the replevin law unconstitutional as impairing the obligation of contracts; fifty-nine members of the House of Representatives voted to remove him by address; thirty-five voted in his favor; less than two-thirds voting against him, he was not removed (Sumner's *Andrew Jackson*, 120-125; 1 *Collins, History of Kentucky*, 30). In 1823 the Court of Appeals held the

replevin laws unconstitutional as impairing the obligation of contracts (Blair v. Williams, 4 Littell [14 Ky.], 34-47; Lapeley v. Brashears, 4 Littell [14 Ky.], 47-87). In 1824 an attempt was made with the support of the Governor to remove the Judges of the Court of Appeals by address, but although a majority of the House of Representatives voted to remove them, a two-thirds Senate majority (23 for removal, 12 against removal) was not obtained.

In 1824 a law was passed abolishing the old court and substituting a new court. Seventy-seven decisions of the new court are reported in 2 T. B. Monroe (18 Ky.), 1-152.

In 1825 an old court House of Representatives was elected, but the hold over Senators with the casting vote of the Lieutenant Governor favored the new court (20 to 19). In 1826 the majority, alike of the Senate and House of Representatives, favored the old court, and a law was passed over the Governor's veto repealing the laws abolishing the old court and purporting to create the new court (Kentucky Acts of 1826, Chap. 8; "An Act to remove the unconstitutional obstructions which have been thrown in the way of the Court of Appeals"). The replevin laws were also repealed. In 1829 the old court declared null and void all the acts and decisions of the new court (Hildreth's Heirs v. M'Intire's Devisee, 1 J. J. Marshall [24 Ky.], 206-9; Sumner, Andrew Jackson, 125-8, 132-4; 4 McMaster, History U. S., 507-9; 5 McMaster, 162-6; 1 Collins, History of Kentucky, 29-33; Henry Burnett, Kentucky's Contribution to Jurisprudence, Kentucky State Bar Association, Yearbook, 1909, pp. 59-65; Dean C. B. Seymour, The Recall, 21 Yale Law Journal, 373-9; Doolan, The Old Court-New Court Controversy, 11 Green Bag, 177-186).

1854-8. Massachusetts. In 1854 United States Commissioner Edward G. Loring, who was also a Massachusetts judge of probate, remanded a fugitive negro slave named Burns to his master's custody pursuant to the fugitive slave law.

The Board of Overseers of Harvard University refused to confirm Loring's appointment as lecturer at Harvard Law School.

In 1858 Governor Banks approved a Legislative address removing Loring as probate judge because he enforced the fugitive slave law. His predecessor, Governor Gardner, had refused to approve a prior address (1 Rhodes, History of U. S., 500-505; 1 C. F. Adams, Richard Henry Dana, 341-347).

V. Recall of federal court decisions by state courts.

1854. *California* Supreme Court decided that the U. S. Supreme Court has no authority to exercise appellate jurisdiction over California courts, because it held that the State and Federal Courts are co-ordinate tribunals.

In *Johnson v. Gordon* (4 California, 368), headnote:

1. "The Constitution of the United States gives no authority to the Supreme Court of the United States to exercise appellate jurisdiction over the State Courts, nor can such authority be derived by implication, or construction.

2. The State Courts and the Federal Courts are co-ordinate tribunals, with

concurrent jurisdiction in many cases, and the decision of the one in which jurisdiction first attaches, is final and conclusive.

3. No cause can be transferred from a State Court to any Court of the United States.

4. Neither a writ of error nor appeal lies to take a case from a State Court to the Supreme Court of the United States."

1855. Chapter 73, Laws of California (1855) provided for the removal of causes from the State to the United States courts in the cases provided by the judiciary act, and authorized appeals or writs of error on federal questions to the Supreme Court of the United States. It further provided that any Judge, Clerk or other officer of any Court violating it "shall be deemed guilty of a misdemeanor in office and liable to impeachment and removal from office."

1858. In *Ferris v. Coover* (11 California, 175) a majority of the California Supreme Court held § 25 of the Federal Judiciary Act constitutional.

1854. *Georgia* Supreme Court held that "The Supreme Court of the U. S. has no appellate or other jurisdiction over this court, and cannot, therefore, make a precedent for it," and overruled *Brown v. Maryland* (12 Wheaton, 419).

Padelford v. Mayor of Savannah, 14 Georgia, 439, 446, 478-484, 506-514.

As to some of Georgia's prior defiances of the Federal Courts, see

3 Ames, State Documents on Federal Relations, Nos. 56-60, pp. 34-43.

The American Nation, A History (Vol. 15; Jacksonian Democracy), 174-181.

1855. *Ohio*. Chief Justice and two other judges refused to certify a federal question arising on the trial of a cause because they held the Federal Supreme Court had no power to review any decisions of State Courts (*Stunt v. Steamboat Ohio*, 3 Ohio Decisions [Reprint], 362-414).

1856. In *Piqua Bank v. Knoup* (6 Ohio State, 342-448), the majority of the Ohio Supreme Court (the Chief Justice dissenting) held that the Supreme Court of the United States has appellate jurisdiction on federal questions over the courts of last resort in the several States.

Recall of Decisions by Federal Courts of Wisconsin

1854-9. In 1854 the Wisconsin Supreme Court affirmed an order of one of its Justices discharging on *habeas corpus* one Booth, who was held by a United States Marshal under a commitment by a United States Commissioner for violating the fugitive slave law, because the Wisconsin courts held the fugitive slave law unconstitutional (*Re Booth*, 3 Wisconsin, 1-144). Booth was then rearrested, indicted, tried and convicted in the District Court of the United States for the District of Wisconsin.

In 1855 the Supreme Court of Wisconsin again discharged him on *habeas*

corpus, treating a State *habeas corpus* as a writ of error to review an alleged defect in a federal indictment (Re Booth, 3 Wisconsin, 157-218).

In 1859 the United States Supreme Court held the fugitive slave law to be constitutional, also that state courts could not by *habeas corpus* or otherwise review the proceedings of federal courts, and reversed both decisions of the Supreme Court of Wisconsin (Ableman v. Booth, 21 Howard, 506).

In 1859 the Wisconsin Legislature adopted and the Government approved joint resolution No. 4 denouncing the decision in Ableman v. Booth as an "assumption of power * * * an arbitrary act of power * * * nothing short of despotism," on the ground that State court decisions as to the power of the United States courts were not reviewable by the federal courts (Wisconsin General Laws of 1859, pp. 247-248; 6 Ames, State Documents on Federal Relations, No. 148, pp. 63-5; 8 McMaster, History People of U. S., 358-9).

1859. The Wisconsin Supreme Court denied a motion to file the mandate of the United States Supreme Court in Ableman v. Booth (Re Booth, 11 Wisconsin, 498-554).

VI. Other attacks on the independence of the judiciary.

1803. *Pennsylvania*. President Judge Addison of the fifth judicial district was impeached for preventing, with the concurrence of a majority of his associates, a new associate (Justice of the Peace Lucas) from addressing the grand jury upon semi-political matters. The Legislature next attempted to impeach the Chief Justice and two justices of the State Supreme Court (and it also attempted to remove by address the remaining justice of the Supreme Court) because that court had punished for contempt a suitor who *pendente lite* published in the city tavern a notice denouncing his adversary as "a liar, a rascal and a coward." A majority, but not a two-thirds majority, of the Senate voted to impeach three of the judges, and the Governor refused to remove the fourth judge upon the legislative address calling for his removal (Loyd, Early Courts of Pennsylvania, 141-7).

1824-5. *Mississippi*. In 1824 Judge Stockton of the Supreme Court of Mississippi held that a debtor's relief stay law giving a sale upon one year's credit with security where goods taken on execution failed to bring two-thirds of their appraised value, impaired the obligation of contracts. He also punished for contempt a sheriff who made a sale pursuant to the stay law. The Supreme Court sustained this decision.

1825. A legislative committee censured the judges (Lynch, Bench and Bar of Mississippi, 92-97).

VII. In the time of war the laws are silent; during the war civil rights may be suspended at the will of the Commander-in-chief. The constitution does not enure to the benefit of the public enemy, of spies, or of enemy sympathizers.

1815. After the British had been beaten off before New Orleans, but before news of the treaty of Ghent had arrived there, United States District Judge Dominick A. Hall granted a writ of *habeas corpus* to release a newspaper letter

writer who criticized Major General Andrew Jackson for not abolishing martial law. New Orleans was then a disloyal city. Jackson refused to obey the writ and imprisoned the judge until news arrived of the treaty of peace. The released judge then fined Jackson \$1,000. Subsequently Congress refunded the fine (Sumner, Andrew Jackson, 46-7; 8 Niles Weekly Register, 245-253, 272-4; 14 Benton's Abridgment of Congressional Debates, 435-6, 612-613, 626-9, 631-2, 637-9, 641-2, 657-8, 700-2, 705-6; 15 Benton's Abridgment of Congressional Debates, 12, 36-45, 46-54, 68-9; 2 Parton, Andrew Jackson, 308-21).

1863. In *Ex parte Vallandigham* (1 Wall., 243, 251-4), the Supreme Court refused to review (by certiorari) the proceedings of a military commission imprisoning Vallandigham in a fortress during the war for sedition and sympathizing with the Confederacy.

1901. *Ex parte Marais* (Appeal Cases [1902], 109), headnote:

"Where actual war is raging, acts done by the military authorities are not justiciable by the ordinary tribunals.

"The fact that for some purposes some tribunals have been permitted to pursue their ordinary course in a district in which martial law has been proclaimed is not conclusive that war is not raging."

1909. In *Moyer v. Peabody* (212 U. S., 78), headnote:

"The declaration of the governor of a State that a state of insurrection exists is conclusive. * * *

"Public danger warrants the substitution of executive for judicial process; and the ordinary rights of individuals must yield to what the executive honestly deems the necessities of a critical moment."

See, also,

Atty. General for the Cape of Good Hope v. Van Reenen,
Appeal Cases (1904), 114, 118-9.

Krohn v. Minister for Defence, South African Law Reports
(1915), Appellate Division, 191, 197-212.

Lloyd v. Wallach, 20 Commonwealth L. R. (Australia), 299,
310-311.

Re Gaudin, 34 New Zealand L. R., 401.

Re Moyer, 35 Colorado, 154, 159.

People ex rel. Welch v. Bard, 209 N. Y., 304, 309-10.

Commonwealth v. Shortall, 206 Pa., 165, 172-9.

Hartranft's Appeal, 85 Pa., 433, 444-50.

Nance & Mays v. Brown, 71 West Virginia, 519.

Ex parte Jones, 71 West Virginia, 567.

Hatfield v. Graham, 73 West Virginia, 759.

VIII. The motives of those who advocate the recall of judges because they are displeased with particular decisions, or who otherwise favor judicial servility, are alike in all ages, states and nations. Judge R. M. Wanamaker says (Illinois State Bar Assn. Yearbook, 1912, pp. 181-2; Italics ours):

"For the correction of * * * grievances and complaints against judges through recall by popular vote * * * , I submit the following for your calm and careful consideration: * * *

"Third. *Courts are now exercising jurisdiction in this country exercised in no other civilized country in the world. I refer particularly to judgments declaring legislative acts contrary to State and federal constitutions and against sound public policy.*

"No English court for more than two hundred years has held an act of parliament unconstitutional. Such jurisdiction had not been exercised by any English court for seventy-five years prior to the formation of our Federal Constitution. The fathers never intended to confer such an extraordinary jurisdiction, then unknown. * * * *It is an usurpation of judicial power.*

"*The exercise of this unwarranted and usurped governmental power against the public interest, against the public health, safety and life, has done more than any other single thing to arouse the present popular hostile feeling toward our courts of last resort.*"

And further (p. 185):

"*You say, I do not want the judge with his ear to the ground. Well, I do not either, but if he is going to get down that low, I would rather have both his ears to the ground than one ear to the railroad track. But I do want him to respond to the instincts of the American heart, the wisdom of the American head, and the just deserts of the American hand.*"

Judge R. M. Wanamaker says (Missouri Bar Association Yearbook, 1912, p. 158):

"The judicial branch is not content to-day merely with interpreting and applying law as it is in every other civilized country in the world, but it is making law, amending law, nullifying law under the mask of interpretation, so that the judiciary has become in fact and in law the Supreme power over and above the legislature, over and above the executive and even over and above the people. Instead of a government of the people, for the people, and by the people, as Lincoln understood it, it has become a government of the people by the judges. And that sort of independence is not approved by the great majority of our American people."

And further (p. 159):

"Again, you say you don't want the judge with his ear to the ground. Well the advocates of the recall do not, either. But if he is going to get down that low, would it not be better to have both his ears to the ground than one ear to the railroad track."

Senator Robert L. Owen's speech of July 31, 1911, says (Vol. 47, Congressional Record, p. 3359):

"That the recall of judges is justified in a peculiar sense in this Republic at this time, for the reasons—first, the Federal Courts have unlawfully assumed the right to declare acts of Congress unconstitutional; second, have undertaken

to invade the legislative function of Congress by judicial legislation; third, have overridden the rights of State laws in a similar manner, either on the charge that such State laws were unconstitutional or that such State laws were invalid on grounds of policy; fourth, such courts have become tyrannical by denying jury trial in contempt cases, inconsiderate in injunction cases, and so forth, and that the reason of this bad behavior is due to the fact that the judiciary is not responsible to the people either by election or recall."

And further (p. 3360):

"The moment the recall went into effect the courts would promptly discontinue their unauthorized, unconstitutional, and grossly improper conduct of declaring an act of Congress unconstitutional."

And further (p. 3364):

"New Hampshire has recalled her judges four times, and I understand on grounds of policy. Rhode Island recalled her judiciary—by dropping them at the end of the short tenure—which declared an act of the Rhode Island legislature unconstitutional."

And further (p. 3370):

"In the Legal Tender Cases did they not reverse themselves? And was not the court packed by President Grant, with the connivance of Congress, who first reduced the court and then added to it for this very purpose?"

And further (p. 3373):

"The Federal Government, consisting as it does of the powers of the several states, may well follow the opinions of the people of the several states in the control of the judiciary by short tenure and by recall."

In "*Les Matinées du Roi de Prusse*" (Berlin, 1766), published as "*Confessions of Frederick the Great*" (G. P. Putnam's Sons), the author (pp. 49-53) speaking of what we would call an independent judiciary, which he terms "a body of representatives of the people, which is a depository of its laws," says (p. 53):

"I am even ready to believe that the crown is the safer on a King's head for its having been given, * * * but that he must be strictly an honest man, * * * to permit his actions to stand every day its scrutiny or examination."

"When one has ambition, one must renounce that plan; I should never have done anything if I had been cramped. Perhaps I might have obtained the character of a just King, but I should have missed that of a hero."

Gilbert E. Roe says (*Our Judicial Oligarchy*; with introduction by Robert M. LaFollette, pp. 17, 23-29):

"The courts have usurped the power to declare laws unconstitutional."

And further (p. 217):

"That the people will make mistakes in attempting to secure control of the judiciary through the medium of the recall and the election of the federal judges is to be expected."

And further (p. 226):

"The recall and also the popular election of all judges for short terms seem at this time measures likely to be adopted in an effort to force the courts back into their original constitutional position where they will serve the interest and protect the rights of the whole people."

Mr. John Jenswold, Jr., says (Minnesota State Bar Association Yearbook, 1912, p. 144):

"In proportion as the judges are removed from contact with the people, so, I am sorry to say, we find their opinions adverse to the best interests of human welfare. Notably is this so with the federal courts."

And further (p. 145):

"In view of the fact that the federal judges are further removed from the people than any other tribunal, I propose to show to you that they take greater part in politics and play a more conspicuous part in all the political questions of this nation than has any judge elected by the people, be his electorate as partisan as you please."

And further (p. 147):

"In 1870, during Grant's administration, some fool claimed that the Constitutional provision giving Congress power to coin money and regulate the value thereof gave it no authority to coin greenbacks, and took the cause to the Supreme Court. The court by a vote of 4 to 3 held that the greenback was not constitutional money (Laughter). This put the Republican party in a hole, and straightway Congress provided for the overworked seven judges who had written that opinion, two additional judges, who, joining with the minority, did, on a reargument, hold that the greenback was constitutional money. It is needless to say that the two new judges were Republicans with sentiments well known before their appointment."

And further (p. 148):

"From the year 1803, when Marshall wrote the right of the courts to review the constitutionality of legislative and executive acts, they have exercised a power, not found in the Constitution, not anticipated by its framers, and not allowed in any other civilized country. By this assumption of power they have gone beyond the reach of everything, except public sentiment."

And further (pp. 153-4):

"Objection is also made that use of the Recall would keep the judges' ears to the ground. A judge might well employ part of his time in listening to the voices from the ground—yes, from the very tillers of the soil, from the fields, from the shops, from the factories—that he may learn of the actual conditions there present—that he may learn of the problems of the people. It might even be a better employment than the time spent in too friendly intercourse with the captains of industry, with the members of exclusive social clubs, or in select society—places occupied by the few who know nothing of the actual conditions of the average man."

Dean J. Allen Smith, *Spirit of American Government*, was the leader of thought whose views were followed by Senator Owen, Judge Wanamaker and Messrs. Roe and Jenswold. He says (p. 231):

"Not only was the state judiciary allowed to assume the veto power, but their independence of public opinion was more effectually safeguarded by depriving a mere majority of the legislature of the power to remove them. The provision of the Federal Constitution requiring a two-thirds majority in the legislative body for removal by impeachment or otherwise was quite generally copied. Without some such safeguard the party in control of the legislature could prevent the exercise of the judicial veto by removing from office any judges who dared to oppose its policy."

And further (p. 342):

"In a similar manner Congress and the President could control the Supreme Court. The Constitution does not fix the number of Supreme Judges."

"Thus Congress, with the co-operation of the President, could control the policy of the Supreme Court in exactly the same way and to the same extent that the House of Commons controls the House of Lords."

And further (pp. 345-6):

"It is not probable, however, that the Supreme Court would much longer be permitted to thwart the will of the majority if the other branches of the Federal Government were thoroughly imbued with the belief in democracy. As explained in Chapter V, the Constitution contains no hint of this power to declare acts of Congress null and void. It was injected into the Constitution, as the framers intended, by judicial interpretation, and under the influence of a thoroughly democratic President, and Congress might be eliminated in the same way."

And further (p. 356):

"If the will of the majority is to prevail, the courts must be deprived of the power which they now have to declare laws null and void. Popular government can not really exist so long as judges who are politically irresponsible have power to override the will of the majority. The democratic movement will either deprive the judicial branch of the government of its political powers or subject it to the same degree of popular control applied to other political organs. The extension of direct nomination and recall to the members of our state judiciary would deprive the special interests of the power to use the courts as the means of blocking the way to popular reforms."

In the debate on the Recall Amendment before the Commonwealth Club of California, Francis J. Heney says in support of the judicial recall (6 Transactions of the Commonwealth Club, p. 185):

"This is a subject, however, which interests me very greatly; and granting the premises of Mr. Fitzgerald and the premises of Mr. Denman, and the premises of President Taft, and of every man whom I have had the pleasure of listening to on that side of this subject, I have to agree with their conclu-

sions and say that the recall is about the worst thing which has ever appeared in public life. But the trouble is with their premises.

Now, I take it that what we are all after is an independent judiciary, and they start with the premise that we now have it. I deny it. I say that we never have had an independent judiciary, and that for the past forty years they have been selected for us by our railroad company."

And further (p. 186; italics ours):

"An independent judiciary! Independent of whom? That is what you are looking for—an independent judiciary. *They say the recall will make judges put their ears to the ground.* Well, I am willing to have them *put their ears to the ground*, just so long as they will take them off the railroad track. (Laughter and applause.) President Taft said the recall of the judges was a nostrum. As a matter of fact, it is a specific. It is not going to make weak men strong, and it is not going to make bad men good. But in New York State, as I told them, it is entirely different from California. In New York State they nominate their own governors. No political boss has anything to do with it. Dix got his nomination for Governor without the influence of any body! They also select their United States Senators. They came very near selecting Sheehan, the people wanted him so badly."

During the 1911 Congressional debate upon the judicial recall provision of the Arizona Constitution, the main argument used by advocates of judicial recall was that alike in Arizona as well as in states with a short term elective judiciary, some judges were said to be controlled by bosses. Instead of following the example of the English Revolution of 1688, which resulted in judicial independence, the Arizona recallers and their disciples have sought to make the judges respond to the will of those whose servants they are said to be.

Senator Bourne said (47 Cong. Record, 3641):

"If the people of Arizona or any other State are competent to elect their judges and can be trusted to act fairly and honestly in the election, they can also be trusted in the exercise of the recall power. * * * Those who oppose the power of the people to recall a judge should—in order to be consistent—also oppose the power to elect judges in the first instance."

And further (pp. 3641-2):

"Though it may be true that in most cases there is no express agreement between the political boss and the candidate for a judicial nomination, any man with the least knowledge of human nature knows that the political boss will aid in securing the nomination of the candidate who seems most likely to be satisfactory to his backers.

Under that same convention system the man once elected judge must look to the political boss for his renomination for a second term. * * *

It is useless for men to hold up their hands in horror and assert that the judiciary is above the influence of the political boss. If the judiciary is above that influence it is certainly also above the influence of popular clamor, and the argument against the recall falls to the ground."

Senator Chamberlain says (47 Cong. Record, 317):

"But as an abstract proposition, why should a judicial officer any more than any other public official be independent of the wishes of his constituents? It is not a democratic conception of republican government that places the representative in a position which will make him indifferent to the wishes of his constituents. Such a conception is aristocratic; it is monarchical; it is autocratic. The democratic conception, on the contrary, is that the people will think for themselves and that the agent or servant of the people, in whatever position he serves, is but the reflection of the popular will. As an abstract proposition, therefore, there is no reason why the judicial officer, as well as every officer of the Government, should not be responsive to the will of those whose servant he is."

Senator Clapp says (47 Cong. Record, p. 3720):

"The argument against vesting this right in the hands of the people is a reflection upon the people themselves. While it is true that here and there a mob may make its appearance, here and there there may be angry passions rising above all restraint, on the other hand there is a sinister purpose that corrupts and invades every channel of this Government into which it can intrude itself, and between those two is the great average of American citizenship which constitutes the composite citizen."

Congressman Jackson quotes from William Allen White as follows (47 Cong. Record, 1507):

"However, just now the people are finding a way around the legislative veto of the State courts. And this they are doing more generally than may be realized by many people. The voters are taking two methods of circumventing the legislative veto of the Courts, first, by amending their State Constitutions, or making new constitutions, and, second, by direct legislation, or the modification of it known as the initiative and referendum. State courts are elective, and therefore are afraid of majorities. They cannot declare constitutional amendments unconstitutional and they handle laws adopted by a direct vote of the people with great care."

"For the veto power of the American courts over legislation—under the assumed rights to declare legislation 'unconstitutional'—is one of the most ruthless checks upon democracy permitted by any civilized people. European Kings and courts do not have such reactionary power."

Senator Poindexter says (47 Cong. Record, 3675):

"They say that you would develop judges with their ears to the ground; in other words, judges who would listen to outside influences in deciding cases. The reason this recall was proposed is because of the fact that in Arizona there were judges upon the bench, where there was no recall, who had their ears, not to the ground, perhaps, but who heard the corrupt whispers of some great political machine, combined with great business interests."

The present Senator Thomas J. Walsh says (47 Cong. Record, 4139):

"The youth of this state are being taught by Prof. Smith, holding the chair of political science in its rising university, that the 'independence of public officials which our forefathers were so anxious to secure has been found to be a fruitful source of corruption.' 'A realization of this fact,' he says, 'has been responsible for the introduction of the recall system under which the people enforce official responsibility through their power to remove by a vote of lack of confidence.' "

IX. The unanimity or *liberum* veto theory of judicial decisions upon constitutional questions arose from the pro slavery, secessionist and extreme states' rights parties' attempt to enforce their dogma that the Federal Constitution was a mere treaty or terminable compact between Sovereign States, which every State was entitled not only to construe for itself, but was also entitled to revoke or terminate at pleasure by seceding from the Union. After slavery and secession lost in the civil war, the unanimity theory was sought to be revived by believers in some of the many forms of absolutism or autocracy in order to limit or destroy judicial review of laws.

After many State stay laws, debtor relief laws, and red dog and wild cat state bank paper bill of credit laws of the period of the panic of 1819 had been held to impair the obligation of contracts, a combination of slave holders and agrarians attempted to enact constitutional amendments or laws (a) to substitute the Senate as a Federal Council in lieu of the Supreme Court, (b) to require a majority of five out of seven or seven out of ten justices to concur before the fundamental law could be enforced, and (c) to repeal section 25 of the Judiciary Act. Neither of these projects passed Congress.

(a) On December 12, 1821, Senator Johnson of Kentucky introduced a proposed constitutional amendment giving the Senate appellate jurisdiction of all controversies to which a State was or desired to become a party, arising under the Constitution, laws or treaties of the United States. No action was taken on the proposition (Annals of Congress, 17th Congress, 1st Session, Vol. 1, pp. 23-5, 68-114; Warren, Legislative and Judicial Attacks on Supreme Court, 47 American Law Review, pp. 12-27).

(b) On December 10, 1823, Senator Johnson of Kentucky introduced a concurrent resolution to instruct the Committee on Judiciary to inquire into the advisability of requiring seven justices to concur in any decision enforcing the fundamental law, also increasing the judicial circuits from seven to ten, with an additional judge to each new circuit (Annals of Congress, 18th Congress, 1st Session, Vol. 1, p. 28).

On March 11, 1824, the Judiciary Committee reported two bills; the first requiring at least five justices to concur in any decision holding a State law unconstitutional; their opinions to be separately expressed; the second increasing the judicial circuits from seven to ten (Annals of Congress, 18th Congress, 1st Session, Vol. 1, p. 336). On April 26, 1824, Senator Johnson moved to amend by requiring the concurrence of seven justices out of ten to invalidate

any State law; both proposed bills and amendments were laid on the table (*Annals of Congress*, 18th Congress, 1st Session, Vol. 1, pp. 574-577). On May 3, 1824, in the House, Letcher of Kentucky submitted a project to require the concurrence of five justices out of seven, which was abandoned after debates on May 14, 1824, and January 26, 1825. Daniel Webster defeated this project by his proposition to require the concurrence only of a majority of the qualified justices (*Annals of Congress*, 18th Congress, 1st Session, Vol. 2, pp. 2514-2541, 2618-2620; *Congressional Debates*, Vol. 1, pp. 365-70; Webster to Story, May 4, 1824; 17 Writings and Speeches of Daniel Webster, 350).

In both houses it was later reported as a project merely to increase the circuits and justices from seven to ten (*Congressional Debates*, Vol. 2, Part I [Senate], pp. 30, 409-571; [H. R.], pp. 872-1149). In the House amendments requiring the concurrence of a majority of all the justices to determine constitutional questions were defeated by Daniel Webster on January 5 and 25, 1826 (*Congressional Debates*, Vol. 2, Part I, pp. 884-886, 1110-1125).

(c) On April 26, 1822, in the House, Stevenson of Virginia proposed the repeal of section 25 of the Judiciary Act (*Annals of Congress*, 17th Congress, 1st Session, Vol. 2, pp. 1681-2). On January 2, 1824, Wickliffe of Kentucky proposed its repeal (*Annals of Congress*, 18th Congress, 1st Session, Vol. 1, pp. 915-6). In 1831, this project was finally rejected by the House, 138 to 51, upon James Buchanan's minority report as Chairman of the Judiciary Committee (2 Buchanan's Works, pp. 67-80).

Dr. Frank J. Goodnow (now President of Johns Hopkins University) in *Social Reform and the Constitution* (1911), says (p. 352):

"Finally, it is possible, without going so far as any of the methods suggested would necessitate, to provide that no court shall decide an act of a legislative body to be unconstitutional, unless the decision is reached by the unanimous action of the members of the court or by the action of any majority that might be determined upon."

Judge R. M. Wanamaker says (*Missouri Bar Association Yearbook*, 1912, p. 157; to same effect, *Illinois State Bar Association Yearbook*, 1912, p. 255):

"Let Congress provide that no law shall be held unconstitutional except by the unanimous judgment of the federal court, and a large part of the opposition now prevailing against courts will end and we will take a long step towards realizing what Lincoln said, 'The people of these United States are the rightful masters of both congresses and courts.'"

In 1911 Senator Bourne introduced a bill requiring the unanimous concurrence of all qualified justices of the Supreme Court before a federal or state law could be held unconstitutional (47 *Congressional Record*, August 14, 1911, pp. 3877-8).

In 1912 the Ohio Constitution required the concurrence of all but one of the Supreme Court judges to uphold the fundamental law where the court below was reversed.

In 1912 the Central Law Journal (75 Central Law Journal, 25), and in 1912 Chief Justice Clark of North Carolina (North Carolina Bar Association Yearbook, 1912, pp. 240-241; North Carolina Bar Association Yearbook, 1914, p. 60) recommended the rule of unanimity or that of the Ohio Constitution by all but one of the judges sitting.

The courts of New Jersey, New York and Tennessee all hold that a legislative requirement of judicial unanimity or judicial minority rule is unconstitutional (Clapp v. Ely, 27 New Jersey Law, 622; Oakley v. Aspinwall, 3 N. Y., 547, 554-5; Northern v. Barnes, 70 Tennessee, 612-3).

The world wide usage of enlightened nations having a Supreme Court, a Court of Appeals, or a Cour de Cassation is against judicial unanimity, or judicial minority, rule. To require decisions upholding the fundamental law to be unanimous would substitute for the principle of majority rule, which prevails in the courts of last resort of all enlightened nations, the requirement of unanimity which (under the name of *liberum veto*) destroyed the Polish Constitution and gave Poland's neighbors their excuse for partitioning it. The minority rule and unpopular government resulting from the *liberum veto* resulted in the ruin of the Polish Commonwealth (1 von Sybel, French Revolution, 185, 338; 6 Cambridge Modern History, 192; 8 Cambridge Modern History, 521-6, 527-552).

The German historian von Sybel says that the *liberum veto* in Poland resulted, among other things, in universal official corruption, especially in the Polish "courts from the highest to the lowest," which he says habitually "sold to the burghers his judicial sentences" (2 von Sybel's French Revolution, 410-414).

6 Cambridge Modern History says (p. 192):

"In other words, that palladium of individual liberty, the *liberum veto*, had sunk so low that its principal use was to shelter high placed felons from the pursuit of justice."

Government by unanimity is the "overthrow of all rational principles of government" (1 von Sybel, French Revolution, 185).

Some of the decisions most important for the welfare of the republic have been rendered by a Court in which judgment was passed by a bare majority. For example, in the Passenger Tax Cases (7 Howard, U. S. Rep., 283) it was held by such a Court that the power of the United States over foreign commerce extended to the transportation of passengers and the regulation of their admission into the country.

X. Your committee has been asked: What result are the usurpationists, recallers, advocate of judicial unanimity or judiciary minority rule, in short, those who in one form or another seek to have each of our forty-nine legislative units (one federation and forty-eight states) armed with plenary and unlimited legislative powers without any Supreme Court or Federal Council to settle the inevitable conflicts, between state and state also between state and federation, or to enforce the bill of rights, trying to accomplish?

Your committee can only answer by quoting or abstracting what the frankest leaders of above school of thought have written on this subject.

Herbert Croly says (*Progressive Democracy*, p. 119):

"The aim of the whole program of modern social legislation is at bottom the creation of a new system of special privilege intended for the benefit of a wage earning rather than a property owning class. * * * The creation of such a new system of privilege has only just been begun."

And further (p. 122):

"The fundamental duty of the state will not be merely the protection of a group of previously defined personal rights, but the conscientious extension of the area of privilege, and the equally conscientious solicitude for its proper exercise."

In the *Outlook* for November 18, 1914, Theodore Roosevelt "in the way of calling attention to * * * excellence" of Mr. Croly's book, says, among other things (*Outlook*, November 18, 1914, p. 649):

"Mr. Croly explicitly points out that the position which American conservatism has elected to defend arouses on the part of its defenders a sincere and admirable loyalty of conviction. He recognizes that our traditional constitutional system has had a long and honorable career, and has contributed enormously to American political and social prosperity, giving stability, order and security to a new political experiment undertaken in a new country under peculiarly hazardous and trying conditions."

"Mr. Croly strikes at the root of the difficulties encountered by men who seriously strive for a juster economic and social life when he points out that the chief obstacles to secure the needed betterment are found in the legalism with which we have permitted our whole Government to be affected, and in the extreme difficulty of amending the Constitution."

"Government under a Constitution which in actual practice can be amended only on the terms which formerly permitted the Polish Parliament to legislate, and under a system of court procedure which makes the courts the ultimate irresponsible interpreters of the Constitution, and therefore ultimately the irresponsible makers of the law under the Constitution—such government really represents a system as emphatically undemocratic as government by a hereditary aristocracy."

Dr. Frederic C. Howe, one of Senator LaFollette's ablest lieutenants, in his book, "*Wisconsin an Experiment in Democracy*," says (Preface, p. VII):

"Wisconsin is doing for America what Germany is doing for the World."

Dr. Howe further says (Text, p. 187):

"No constructive programme can be developed in the midst of a class conflict. It can be achieved by a benevolent autocrat, as in Germany, or it can be achieved by democracy. There is no place for State building in the midst of a struggle between privilege and democracy."

The able (and anonymous) leader of thought and action who wrote "*Philip Dru: Administrator*" (published by B. W. Huebsch), makes his heroes say:

"It was seldom that the people would be led by wise, honest and unselfish men. There is always the demagogue to poison the mind of the people against such a man;" that "to be moderate and to tell the truth at all times and about all matters seldom pleases the masses" (p. 25); that "The citizens at large do not scrutinize measures closely; they are too busy in their own vineyards to bother greatly about things which only remotely or indirectly concern them. This selfish attitude and indifference of our people has made the boss and his methods possible" (p. 195); that "The average American citizen refuses to pay attention to civic affairs, contenting himself with a general growl at the tax rate, and the character and inefficiency of public officials. He seldom takes the trouble necessary to form the Government to suit his views. The truth is he has no cohesive or well digested views, it being too much trouble to form them" (pp. 199-200).

The distinguished anonymous author's remedy for the alleged shortcomings of his countrymen is to "change from constitutional government to despotism" (p. 156), by the conquering general in a social war "assuming the powers of a dictator" for life or at the dictator's pleasure (pp. 152-163), and limiting "the power of the courts to the extent that they could no longer pass upon the constitutionality of laws" (p. 168). His dictator finally set up a federal consolidated Congressional despotism of the parliamentary type, all Congressmen and Senators to be subject to the recall, without any Federal Council or Supreme Court empowered to enforce the Constitution or to determine constitutional conflicts (pp. 238-243). The states became in effect departments of the federal government, whose governors had no veto power and were prohibited from suggesting or recommending any legislation, and whose Senate and Governor were alike subject to the recall (pp. 244-8).

Before abdicating (like Sulla) the dictator waged war on Mexico and all the Central American Republics, whereby he overthrew peonage, redistributed the large estates or haciendas, and established a protectorate over Mexico and Central America as an amalgamated dependent federation (pp. 280-291). He then recognized Great Britain's supremacy of the seas, decreed a tariff for revenue only throughout the American Empire he had created, abolished the Monroe doctrine, and proceeded with some other naval world powers to the partition of the world. Canada, like Mexico and Central America, became an American federal dependency. South America, the Balkans and Turkey became subject to German colonization and development. China and the Philippines became Japanese dependencies, Africa went to England. An entente was formed with Japan against Russia as the one alleged incorrigible despotism (pp. 272-276). France the dictator seems to have ignored.

This Committee therefore respectfully presents the following resolutions.

Dated *November 4, 1916.*

HENRY A. FORSTER,
EVERETT P. WHEELER,
CHARLES H. BECKETT,
FREDERICK D. COLSON,
EVERETT V. ABBOT.

Resolved, That any State Constitution requiring more than a majority of the qualified judges of the state court of last resort to concur, before it may enforce the Federal Constitution, is in violation of that clause of the Constitution of the United States which makes it the supreme law of the land.

Resolved, That any statute requiring more than a majority of the qualified judges of any American court of last resort to concur before it may enforce the Constitution of the United States or of the State is contrary to our American federal republican system of limited and balanced government, is contrary to the practice of courts of last resort in other enlightened federations in holding laws *ultra vires* or *intra vires* by a majority vote of their qualified justices and creates judicial minority rule contrary to the practice of free, independent and enlightened modern nations.

Resolved further, That this committee be and it hereby is discharged.

Adopted January 12, 1917.

APPENDIX B

THE HISTORY OF THE PRIVY COUNCIL AS A LEGAL TRIBUNAL OR COURT

[NOTE: After the reading of the paper "Another Supreme Court," Mr. Justice Riddell was requested by the Association to supplement the paper by an account of the history of the Privy Council as a Court—the following is accordingly furnished.]

The King's Privy Council is a "Common Law" body, that is, it was formed by a process of evolution when the common law of England was in the making and not *uno actu* by decree of Monarch or Act of Parliament.

The precise origin of the Privy Council is of little importance, historically or otherwise: we know that before times which are in the full sense historical the King could not see to it personally that all his subjects had justice done to them; and he had therefore the assistance of a body of men chosen by himself, a Council.

To this Council was entrusted the administration of justice; in course of time, formal courts were formed from the Council, the Courts of King's Bench, of Exchequer, of Common Bench, with special functions and apparatus for the performance of these functions. But thereafter there remained no inconsiderable part of the original jurisdiction of the Council unallotted and this continued to be the case on the crystallization of the Court of Chancery. The Privy Council continued from time to time to exercise "a kind of extraordinary and corrective jurisdiction to prevent violence, corruption or intimidation; and especially combination and conspiracy to obstruct or prevent the course of justice."

This was the case before the creation of the Court of Star Chamber in 1487 by 3 Henry VII, c. 1, the name of the Court being taken from the Chamber wherein the Council was accustomed to sit—the Court of Star Chamber, as Hallam points out, was in fact a Judicial Committee of the Privy Council.

After the statute, the Privy Council continued to sit on occasion under its original Common Law jurisdiction and quite independently of the statute: but most of the business was done in the statutory court.

The Court of Star Chamber was abolished in 1640 by the act 15 Car. I, c. 10, which provided that neither the King nor the Privy Council should have jurisdiction over the estates of any of the subjects of the kingdom but that all questions respecting the same should be tried and determined by the ordinary course of law in the ordinary courts.

But this Act of the Long Parliament dealt only with subjects of the Kingdom and not at all with subjects of the King in territory without the Kingdom: and any subject in a dependency had still his right to apply to the King in Council as before. Moreover at the Common Law the original jurisdiction to decide cases "relating to the boundaries between provinces, the dominion and proprietary government is in the King and Council," as Lord Chancellor Eldon says in the famous case of *Penn v. Lord Baltimore* (1750) 11 Vesey Sr., 444 at p. 446. This jurisdiction was not at all interfered with by the Act of 1640.

It does not seem to be quite certain when appeals came first to the Council from non-English territories of the King of England; but apparently it is practically certain that they came from the Channel Islands. Until the seventeenth century the foreign dependencies were not of great importance; but in that century appeals are found coming in; and in 1667 a special Judicial Committee was formed by the Privy Council from its members to deal with such appeals. This was without any authority from Parliament, for none was needed, the authority of the Common Law being sufficient.

After the Revolution of 1688 the appeals began to increase, and in 1691 an order was passed that "all appeals be heard as formerly by the Committee who are to report the matters so heard by them and with their opinion thereon to the King in Council." This "Committee for Appeals" had jurisdiction over appeals from the supreme courts of the Colonies. Early in the eighteenth century Colonial appeals began to come in in considerable numbers: and many most important matters were passed upon by the Committee.

The celebrated *Penn v. Lord Baltimore* case already referred to was in fact to determine the rights of Pennsylvania and Maryland over part of the present Delaware: but it was arranged that the matter should be tried as a civil suit in Chancery: this was done: and the King in Council made an order in accordance with Lord Hardwicke's decision. But this case can not be cited as an instance of judicial power.

While there are many instances of the decision by the Committee in Colonial times on private litigation, I am not aware of the exercise of judicial power in any public controversy, e.g., of boundary, etc. (Mr. Snow's valuable address at the first meeting of this Society should be consulted.)

Indian appeals stand on a peculiar footing: the right to appeal was first given in 1773, 16 George III, c. 63. Turning now to another jurisdiction of appeal we note that originally within England appeals, so far as they were allowed at all from the Courts of Law, went to the Court of Error, or to the Lords—from the admiralty to the King in Chancery, that is in practice to a Court of Delegates and from the Ecclesiastical Court to the Pope, that is in practice to Delegates appointed by the Pope. After the Reformation in 1532 (24 Henry 8, c. 12) appeals to Rome were forbidden; and the next year (25 Henry 8, c. 17) it was provided that appeals from the Archbishop's Court should be to the King in Chancery—he appointed Delegates forming a High Court of Delegates to hear these appeals.

In 1832 (by 2 and 3 Wm. 4, c. 92) the appeals in Ecclesiastical matters which since the Reformation had been to the High Court of Delegates, as well as appeals in Admiralty were transferred to the King in Council. The following year the statute 3 and 4 Wm. 4, c. 41 was passed which regulated the constitution of the Judicial Committee for the hearing of appeals—which Committee was to consist of the Lord President of the Council, the Lord Chancellor, and such members of the Privy Council as shall hold the office of the Lord Keeper, First Lord Commissioner, Lord Chief Justice, Lord Chief Baron, Master of the Rolls, Vice-Chancellor of England, Judge of the Prerogative Court, Judge of the Admiralty, the Chief Judge in Bankruptcy, and all Privy Councillors who shall have held any of these offices—to which the King by sign manual might at any time add two other Privy Councillors.

By the same Statute of 1833 it was provided that all appeals from the Admiralty, Vice-Admiralty, or other Courts abroad which theretofore had lain to the High Court of Admiralty in England should be to the King in Council.

By the Act of 1832 (2 and 3 Wm. 4, c. 92) the appeals which in Admiralty cases had from even before the 25th Henry 8, gone to the King in Chancery and so were heard by the Court of Delegates, were transferred to the King in Council. So by 1833, we have the King in Council vested with the statutory powers of hearing Admiralty and Ecclesiastical appeals, and still continuing to exercise a power which did not depend upon Statute of supervising the proceedings of all Courts in the British Dominions not within the four seas. All these appeals—all appeals to the King in Council—were to be referred to the Judicial Committee who were to report to His Majesty in Council. By this Act two ex-Judges from India or beyond the seas were also provided for. Further Ecclesiastical appeals were provided for in 1840 (3 and 4 Vic., c. 86); this act also got rid of an anomaly—Ecclesiastical appeals could theretofore have been heard without a single Bishop or Ecclesiastical Judge being upon the Committee—this Act provided that every Archbishop and Bishop of the United Church of England and Ireland who should be a member of the Privy Council should be a member of the Committee for the hearing of such appeals and one at least be present. Another Ecclesiastical appeal is given in 1874 (37 and 38 Vic., c. 85) and in 1846 (27 and 28 Vic., c. 21) an appeal is given in prize cases. In 1871 (34 and 35 Vic., c. 91) provision was made for four Judges or ex-Judges of the Courts at Westminster or in India being appointed.

Then came the Supreme Court of Judicature Act of 1873, whereby all Admiralty appeals were taken away from the Committee; and in 1876 the provision was made for four Lords of Appeal in ordinary at a salary of £8000 each to sit in the House of Lords and, if Privy Councillors, also in the Judicial Committee.

In 1877, all jurisdiction on the part of the Queen in Council in matters of appeal from Ireland was abolished. In 1895 a very important provision was made that any Judge or ex-Judge of the Supreme Court of Canada or any

Superior Court in any Province of Canada, of Australia, New Zealand, Cape of Good Hope or Natal, who should be a Privy Councillor should also be a member of the Judicial Committee.

At the present time this Judicial Committee hears appeals in English cases only in Ecclesiastical matters. Upon every appeal of this character, at least three Bishops must sit as assessors, under the provisions of a rule made in 1876. The ultimate appeal in other matters goes to the House of Lords. In Scottish and Irish matters the Committee does not exercise any appellate jurisdiction whatever.

After many centuries of self-government by the Privy Council, Parliament took it in hand to constitute the Judicial Committee itself in 1833 by 3 and 4 Will. IV c. 41; the statute directed who should form the Committee, the appointment of a Registrar and generally laid down regulations. Since that time the Judicial Committee has been purely statutory, and the Privy Council has not been in that regard *imperium in imperio*. Most of the subsequent legislation deals with the constitution of the Judicial Committee and is not of interest to Americans.

Those desiring precise information may look at the Statutes: 7 and 8 Vict., c. 69, s. 9; 14 and 15 Vict. c. 83, s. 16; 39 and 40 Vict. c. 59, ss. 6, 14; 44 and 45 Vict. c. 3; 50 and 51 Vict. c. 70, s. 4; 58 and 59 Vict., c. 44; 8 Ed. VII, c. 51; 3 and 4 Geo. V, c. 21.

An interesting account of the Court of Star Chamber, etc., will be found in the Introductions to two volumes of the Selden Society Series viz: "Select Cases before the King's Council in the Star Chamber, etc.," (1903), Vol. XVI, (1910), Vol. XXV, in which the motto *πρὸς τὴν εὐθερίαν* is honoured in the observance; Anson's "Law and Custom of the Constitution" has short but accurate references; Lord Eustace Percy's "The Privy Council under the Tudors" is interesting but not helpful for our particular purpose; Wood Renton's pamphlet on "The Conditions of Appeal from the Colonies to the Privy Council" is valuable, as of course are Pownall's "Administration of the Colonies;" Macqueen, "Appellate Jurisdiction of the House of Lords and of the Privy Council," and (the second edition of) Bowyer's "Commentaries on the Constitutional Law of England." Dicey's "The Privy Council" can scarcely be considered worthy of that very eminent legal writer; my own address before the Missouri Bar Association will be found in the American Law Record for 1900, and no one can ever safely neglect Blackstone.

WILLIAM RENWICK RIDDELL.

INDEX

- Alleghany Mountains, wild lands west of, 198.
- American Society for Judicial Settlement of International Disputes: officers and executive committee, iii; advisory council, vi; its aim, 2; banquet of, 204.
- Another Supreme Court, 104.
- Apparent helplessness of the Supreme Court, 173.
- Appendix A, 249.
- Appendix B, 348.
- Arbitration, 103.
- Articles of Confederation, 49, 64, 72.
- Attacks on judicial review during 1913-14, 308.
- Australian and privy council decisions, holding Australian commonwealth and state laws ultra vires, 313.
- Beaumont *vs.* Barrett, 114.
- Blair, Justice, quoted (footnote), 46; cited, 76.
- Boundary dispute, 152.
- Boundary dispute between Pennsylvania and Connecticut, 226.
- Bradley, Justice, quoted (footnote), 41, 96.
- Briand, Premier, quoted, 238.
- British North American Act, 117.
- Bryce, Lord, telegram, 238.
- Burke, quoted, 189.
- Calvin's Case, 27.
- Campbell *vs.* Hall, 28.
- Can the Supreme Court Compel Appearance of Defendant State, 168.
- Canadian Pacific Railway, 119.
- Carson, Hampton L., remarks of, 210.
- Causes of the Supreme Court's success, 183.
- Chace, Justice, quoted, 18.
- Charge of judicial usurpation when courts review unconstitutional laws, 302.
- Charles II, quoted (footnote), 48.
- Chisholm *vs.* State of Georgia, 13, 49, 66, 68, 126.
- Cleveland, President, cited, 59.
- Coke, Lord Chief Justice, cited, 84.
- Colonial Legislature, Powers of, 117.
- Committee of Detail, 71.
- Constitution of the United States, 211.
- Constitution preferred to a statute of Congress, 92.
- Constitutional Convention of 1787, 71.
- Constitutional convention, Words and acts of the framers in the, 36.
- Constitutional rights of States at issue, 26.
- Continental Congress, 96.
- Controversies as to boundaries, 126.
- Controversies between States, 9, 158.
- Convention respecting the limitation of force in the recovery of contract debts, 45.
- Cooley, Judge, quoted, 158.
- Council of Conciliation, 56.
- Court of Arbitral Justice, 201.

- Court of arbitration, 246.
Curtis, Justice, cited, 80.
- Demand for a True International Court, 2.
Devine *vs.* Holloway, 114.
Dominion Act, 121.
Doyle *vs.* Falconer, 114.
Dred Scott Case, 25.
Duty of courts to refuse to execute statutes in contravention of the fundamental law, Report of the committee upon, 249; Second Report, 301; Third Report, 325.
- Ellery, William, Report written by, 221.
Ellsworth, Mr., quoted, 156.
Excise Act of 1791, 57.
Execution of Judgments Against States, 25; judgment against States, 25; nature of the power of execution, 30; extent of the power, 41; manner of exercising the power, 53.
- Fisheries and fishing rights, 119.
Fisheries dispute with Great Britain, 5.
Florence Mining Company *vs.* Cobalt, 115.
Foreign relations, 94.
Fuller, Chief Justice, quoted (footnote), 56, 99, 100, 143.
- Genesis of the campaign of 1912 for the total or partial suppression of judicial review of the validity of laws, 303.
Georgia *vs.* Tennessee Copper Company, 147.
Government, General structure of, 128.
Government, Powers of, 140.
- Gray, Justice, quoted, 99.
Grayson *vs.* Virginia, 16, 67.
Grey, Sir Edward, cited, 3, 237.
- Hamilton, quoted, 44, 47, 66, 174, (footnote) 183.
Hans *vs.* Louisiana, 98.
Harlan, Justice, cited, 79.
Henry, Patrick, quoted, 179.
Hill, David Jayne, quoted, 235.
Historical view of courts refusal to execute constitutional law, 250.
Hodge *vs.* The Queen, 114.
Holmes, Justice, quoted, 61, 148.
Holy Roman Empire, 47.
How Does the Supreme Court Draw the Line Between Justiciable and Non-Justiciable Questions? 124.
How Does the Supreme Court Endeavor to Obtain Presence of Defendant State? Can the Supreme Court or Can the Government Under our System Compel Appearance of Defendant State? 64.
Huger *vs.* South Carolina, 18, 69.
Hull, William I., addresses of, 168.
- Imperial Chamber, 66.
International law, Conferences to "formulate and codify" rules of, 7.
Interstate common law, 143.
In What Classes of Subjects Can a State Sue Another in the Supreme Court? 157.
Iredell, Justice, quoted, 17.
- Jackson, President, quoted, 54; cited, 59.
Jay, Chief Justice, quoted (footnote), 31, 50.
Jefferson, quoted, 65.
Judicial committee, 109; functions of, 111.

- Judiciary Act, 39.
- Jurisdiction to render a direct judgment confined to the Supreme Court, 29.
- Kansas *vs.* Colorado, 101, 139.
- Kent, quoted, 142.
- Kentucky *vs.* Dennison, 153.
- League to Enforce Peace, powers and aims, 5.
- Louisiana *vs.* Texas, 99, 166.
- McCulloch *vs.* Maryland, 87.
- Macfarland, Henry B. F., toast-master, 205, 228, 245, 248; address of, 206.
- Madison, President, quoted, 50, (footnote) 51, 195.
- Marburg, Theodore, address of, 1, 2; presiding officer, 9, 24, 25, 63, 69, 82, 204, 205, 239, 248.
- Marbury *vs.* Madison, 83.
- Marbury, William L., address of, 124.
- Marshall, Chief Justice, quoted (footnote), 40, 87, 176.
- Militia called out, 59.
- Miller, Dr., quoted, 157.
- Minor, Raleigh C., address of, 9.
- Missouri *vs.* Illinois, 100, 143, 148.
- Mode of summoning a defendant State, 17.
- New Jersey *vs.* the State of New York, 20.
- New nationalism and judicial review of laws, 320.
- New York and New Hampshire *vs.* Louisiana, 101.
- New York State Bar Association, 84.
- New Zealand *ultra vires* decisions, 315.
- Nominations, Report of committee on, 204.
- No police or military power to coerce a State, 169.
- Olmsted Case, 219.
- Oregon *vs.* the Pacific Telephone and Telegraph Company, 144.
- Oswald *vs.* New York, 12.
- Ovation to patriot judges, 274.
- Penfield, Walter S., address of, 157.
- Penhallow *vs.* Doane, 223.
- Permanent International Arbitration Court, 48.
- Political demands, 323.
- Power of Supreme Court to execute judgments, 46.
- Power of the Supreme Court to compel the appearance of a State, 68.
- Preamble of the Peaceable Settlement Convention, 75.
- Present Outlook, 229.
- President, address of, 1, 2.
- President shall exercise the executive power of the nation, 32.
- President to come to aid of the Federal Courts, 50.
- Preventing the pollution of water-courses, 159.
- Preventing unreasonable use of the waters of a stream, 159.
- Privy council as a legal tribunal or court, The history of the, 348.
- Privy council decisions holding laws *ultra vires*, 314.
- Privy Council of the King, 105.
- Procedure by default in actions at law against a State, 23.
- Procedure by default in equity against a State, 23.
- Procedure by Default in Supreme Court Against Defendant States, 9.
- Procedure in equity cases, 17.
- Process Act of 1789, 39.
- Program, vii.

- Railroad strike of 1894, 88.
- Ralston, Jackson H., remarks of, 63; address of, 64; cited, 72.
- Randolph, Edmund, quoted (footnote), 31.
- Real majesty and great success of the Supreme Court, 180.
- Recall of decisions by Federal Courts of Wisconsin, 333.
- Rex *vs.* Brinkley, 115.
- Rhode Island *vs.* Massachusetts, 151.
- Riddell, William Renwick, cited, 70; addresses of, 104, 229.
- Roman judicial tribunals, 37.
- Rutledge, John, quoted, 71.
- Scott, James Brown, address of, 69; remarks of, 24, 204, 245; presiding officer, 83, 89, 91, 103, 123, 156, 168, 202, 203.
- Service of process at law or in equity upon defendant State, 23.
- Slayden, James L., remarks of, 240.
- Snow, Alpheus H., address of, 25; quoted, 104.
- Society of Nations, 4.
- South Africa *ultra vires* decisions, 315.
- South Dakota *vs.* North Carolina, 162.
- Star Chamber, 106.
- State of Massachusetts *vs.* State of Rhode Island, 21.
- State of South Dakota *vs.* State of North Carolina, 45.
- States, controversies of, 217.
- Stone, Mr., quoted (footnote), 33.
- Suits for recovery of debts and for accounting, 159.
- Suits to enforce State bonds, 161.
- Supreme Court a model for the Society of Nations, 70; as a pattern for an international Court of Justice, 154; as the exemplar of the World Court, 195; powers of the, 3; public opinion, 190; two general orders, 17; reasons for its helplessness, 178.
- Taft, William Howard, remarks of, 91; address of, 92.
- Taney, Chief Justice, quoted, 51; cited, 52.
- The Queen *vs.* Burah, 114.
- Thompson, Justice; quoted (footnote), 31, 40.
- Treaty obligations, Faithfulness of, 8.
- Two States not permitted to go to war with each other, 3.
- Two systems of enforcing the fundamental law in federations, 312.
- United States: all writs of compulsory process in name of the President, 32; executive power of, 36; judicial power of, 12.
- United States *vs.* Peters, 223.
- United States *vs.* Texas, 79.
- Virginia *vs.* West Virginia, 160.
- Von Bethmann-Hollweg, Chancellor, quoted, 236, 237.
- Washington, President, cited, 57, 214; quoted, 57, 58, 215.
- Webster, Daniel, quoted (footnote), 181, 184.
- What is the Function of the Supreme Court in the American Government, 92.
- Wheeler, Everett P., remarks of, 83, 89, 202, 203.
- White, Dr. Andrew D., quoted, 194.
- Wilson, Hames, quoted, 71.
- Wilson, James, quoted (footnote), 49, 67.
- Wisconsin *vs.* Pelican Insurance Company, 138.
- World's Court League, 4.

